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—IN THE—

United States Supreme Court

OCTOBER TERM, A. D. 1880.

No. 996.

Town of Harter, et al.

vs.

Edward Rutz, et al.

Abstract and Brief.

W. J. HENRY, and G. A. HOFF,
Solicitors for Appellants.

—IN THE—

Supreme Court,

—OF THE—

United States Of America,

OCTOBER TERM, A. D. 1880.

THE TOWN OF HARTER, et. al.
vs.
EDWARD RUTZ, et. al.

} Appeal from the Southern District of Illinois.

ABSTRACT.

This is a bill filed by the Township of Harter and certain taxpayers thereof, in their own behalf and in behalf of all the other taxpayers of the township against Edward

Rutz, as Treasurer of the state; Thomas B. Needles as auditor; as clerk of the county court of Clay county, and as collector of Harter township, Clay county, *et al.*, for the purpose of enjoining the collection of a tax with which to compensate a certain issue of bonds, amounting in the aggregate to $20,000, purporting to have been issued by said township, under an act of the legislature, entitled "an Act to incorporate the Illinois Southeastern Railway Company."

The bonds bear date on the 1st day of April, A. D. 1870, and recite that they are issued under and in pursuance of an election held on the 10th day of November, 1868, by virtue of said act.

That for the purpose of determining whether said town of Harter should donate to the Illinois Southeastern Railway Company the sum of $20,000, said company made a proposition that said amount should be raised and paid to said company, on the following terms: one-third when the said railway company should have graded and tied the railroad through the township, from north to south, touching the town of Flora, the amount to be raised by a special tax levied for that purpose, and collected in the year 1869; one-third when said railroad was timbered and ready for the iron, and one-third when the road should be fully completed, the same to be levied and collected in the years 1870–1 and paid over to the treasurer of said railway company.

That after the giving of notice, an election was held on the 10th day of November, 1868, for the purpose of accepting or rejecting said proposition, and that 300 ballots were cast for donation and 42 ballots against donation.

That on the 1st day of April, 1870, township bonds were issued to the Springfield and Illinois Southeastern Railway Co. to the amount of $20,000; that said township was not authorized under the charter of the Illinois Southeastern Railway Co. to issue bonds, in payment of said donation; neither was said township, by the terms of the written proposition of said railway company, authorized to issue bonds and donate the same to said railway company.

That the supervisor and town clerk, without warrant or authority of law, on the 1st day of April, 1870, issued twenty bonds calling for $1,000 each, with interest at the rate of 10 per cent., interest payable semi-annually, due in twenty years, &c. That on, to wit., the 13th day of May, 1870, the bonds were registered in the office of the auditor of the state of Illinois. That said bonds were issued on the 1st day of April, 1870, by the supervisor and town clerk, without corporate action, and without the authority or concurrence of the board of town auditors, and without the question of the issuing said bonds to said railway company having been first submitted to the legal voters of said town, in accordance with the provisions of the charter aforesaid, or in accordance with the amendment to said charter, that went into force on the 24th day of February, 1869.

That no written or printed application, signed by twenty-five legal voters, had been presented to the clerk thereof, as required by said act, and that no election was held, conducted, and returns thereof made as required by said act. That at the time of holding said pretended election and at the time of the issuing said bonds, there were more than 300 legal voters living in the township of Harter that were legally entitled to vote at an election, and that said bonds were not entitled to be registered under the provisions of an act entitled "An act to fund and provide for paying railroad debts," approved April 16th, 1869,, and that the auditor had no authority to certify a special tax to the clerk of the county court of said county.

That the supervisor and clerk of said township issued said bonds, without warrant or authority of law, to the Springfield and Illinois Southeastern Railway Co., a corporation other and different from the corporation aforesaid, to which said pretended donation was, by the election first aforesaid, authorized to be made; and that said bonds were issued by the supervisor and town clerk to the railway company last aforesaid in violation of the duties and trusts imposed on them by law, and without warrant or authority of law; and that no tax can be legally levied to pay the principal and interest on said bonds.

That before the 20th of May, 1870, the Illinois Southeastern Railway Co. consolidated with the Pana, Springfield and Northwestern Railway Co. and surrendered its franchise; and that the charter of the Pana, Springfield

and Northwestern Railway Co., one of the constituent companies, among other things, provides: that "for the purposes of voting, &c., * * * * an election may be held by the legal voters of the town, *but no such vote shall be taken unless at a regular election for town and county officers.*"

That the registration of said bonds, by the terms of the registry law, became, were and still are restricted in their negotiability, and became, were and still are subject to all the rights and equities existing against said bonds. That after the registration of said bonds, as aforesaid, the auditor proceeded, from year to year, to certify to the clerk of said county court an amount of tax to be levied, &c., and that he is still threatening and intending so to do.

That the registration of said bonds in the office of the auditor of said state is a cloud upon the title of the real estate of complainants and other taxpayers of said town.

The bill prays that the State Treasurer, State Auditor, County Clerk, Town Collector, and the unknown owners of said bonds may be made defendants, and that the collection of said illegal tax may be perpetually enjoined; and for general relief.

On the 17th day of March, 1880, John A. Kernochan filed his petition in the circuit Court of Clay county, Illinois, setting forth that on the 3d day of September, 1878, Harter township *et al.* exhibited their bill of complaint against Edward Rutz, treasurer of the state of Illinois,

et al., and the unknown persons, holders and owners of bonds and coupons issued by said township to the Springfield and Illinois Southeastern Railway Company, in which complainants aver that publication was made, to notify said unknown persons, of whom your petitioner was and is one, of the pendency of said suit. That on the 2d day of May, 1879, a *pro confesso* decree in said suit was rendered against said defendants and your petitioner, as an unknown person, defendant to said bill. That he has not been summoned or served with a copy of the bill of complaint or received notice of the pendency of said suit, and that he has received no notice in writing of such decree. Petitioner, therefore, appears in court and asks to be heard touching the matters of such suit and decree, upon such terms as to the court may seem just in pursuance of the statute, and prays that upon a further hearing of this cause the court will order that said decree be set aside, altered or amended as to this court will seem
37 just and equitable.

That on the 17th day of March, 1880, Kernochan presented a petition to the circuit court of Clay county, Illinois, in which he sets forth that the amount in dispute,
38 exclusive of costs, exceeds five hundred dollars; that the controversy in said suit is between citizens of different states, and that the petitioner was at the commencement of this suit, and still is, a citizen of the state of Massa-
39 chusetts, and that complainants were then and still are citizens of the state of Illinois; that petitioner was then and still is the owner of $20,000 of bonds, of Harter

township, Clay county, in controversy, purchased by petitioner for a valuable consideration.

Petitioner offers sufficient security for his entering in the circuit court of the United States, on the first day of its next session, a copy of the records in this suit, and for paying all costs, &c. Also, on the same day filed a bond for the removal of said cause into the circuit court of the United States.

That at the November term of the circuit court of Clay county, Illinois, 1878, the following order was made by the court: "Town of Harter *et al.* vs. Edward Rutz *et al.*: And now on this 13th day leave is given the defendants herein to file answer to plaintiff's bill within four months, and this cause is continued therefor."

That at the April term, 1879, a decree was entered in said cause in substance as follows: And now comes this cause on to be heard, upon the bill, exhibits, &c., and it appearing to the court that all of the defendants were duly served with process, notified of the pendency of said suit by publication, entered their appearance to said bill, and were amenable to the jurisdiction of said court, and that the court had jurisdiction of the subject matter and the person of said defendants, and were ruled to answer said bill, and failed to comply with said rule, and that a decree *pro confesso* be entered by said court, and that the allegations in said bill be taken as true.

It is therefore ordered that all of the allegations of said bill are true, and that the complainants and the other tax-

payers of said town are entitled to be relieved in the premises. It is further decreed by the court, that the pretended elections authorizing the issuing of said bonds be, and the same are hereby declared to have been illegal, without warrant or authority and void, and that the bonds and coupons issued by the supervisor and town clerk to the Illinois Southeastern Railway Company, and delivered to the Springfield and Illinois Southeastern Railway Company, be and the same are hereby declared void, and to be issued without warrant or authority of law.

It is further decreed by the court, that the actions and doings of the auditor of the state of Illinois, in levying or directing the levy of a tax with which to pay interest on said bonds, and said bonds and the registration of said bonds be and the same are hereby declared to be illegal, and to have been done and performed without warrant or authority of law; that said registration is hereby annulled and set aside and the same declared to be illegal.

It is further decreed by the court, that said defendants are perpetually enjoined from negotiating or otherwise putting in use said bonds, or from in any manner attempting to collect the same, or from collecting or attempting to collect a tax with which to pay said bonds or the interest thereon, upon pain of being adjudged in contempt.

That on the 3d day of the March term, 1880, the following order was made by the court: "Comes the defendants, by George A. Sanders, and presents the petition of John A. Kernochan, and moves the court to redocket this cause and open the decree herein. The court being ad-

vised in the matter, orders that the prayer of the petition be granted, and the said defendants present the petition of John A. Kernochan to remove this cause to the Federal court, and also files his bond herein, which by the court is approved. It is ordered by the court that this cause be certified to the Federal court, and that the clerk of this court transmit all papers belonging to this cause to said Federal court."

The clerk certifies the foregoing to be a true copy of all the records and proceedings had in said cause, and that the papers herewith transmitted and marked respectively A, B, C, D, E, F, G, H, I and J, are all the papers in said cause.

That at the June term, 1880, a motion was made by the town of Harter *et al.* to remand said cause from the Federal court to the circuit court of Clay county, for the following reasons:

1st. That said circuit court of the United States has no jurisdiction of said cause.

2d. That the petition, &c., for the removal of said cause was not filed in the state court, at the first term thereof, at which said cause could have been tried.

3d. That the petition and bond for the removal of said cause were not filed in said state court until after a decree had been entered in said cause.

4th. That there is no controversy existing between the petitioner for the removal of said cause and said complainants.

5th. That the controversy, if any, is not wholly between citizens of different states, nor between the complainants and the parties seeking to remove said cause.

6th. That the party petitioning for the removal of said cause had not filed certified copies of the record and proceedings in said cause on the first day of the term of this court, as required by the act of congress of March 3d, 1875.

That at the June term, 1880, the defendant, John A. 59 Kernochan, filed his answer to complainants' bill, as follows: Admits that the Illinois Southeastern Railway Co., a body corporate by virtue of legislative enactment of the state of Illinois, being about to construct a railway to and through Harter township, Clay county, Illinois, submitted a proposition, as alleged in said bill, to the town of Harter, requesting the proper authorities to hold an election to determine whether said town should donate to said railway company twenty thousand dollars, which proposition was in writing, and defendant believes exhibit "A" of complainants' bill a true copy thereof.

Admits that an election was called and held, as set forth in said bill, in and by said town or the electors thereof, in pursuance of said legislative enactment, to de- 60 termine whether they would accept or reject said proposition. That at said election said proposition was carried by a large majority; that said town authorities determined to and did make said donation, to be paid at the time and in the sums and manner set forth in said proposition. Does not know whether exhibits "B" and "C" of com-

plainants' bill are true and correct copies or not, as set out.

This defendant, further answering, says, so far as he knows and believes, the proceedings of said town, by which it determined to make said donation, were strictly in accordance with the legislative enactment by which said railway company was chartered and donations authorized and provided for. The provisions of said act, as found on pages 750-1-2-3-4 and 5, vol. 2, Private Laws of State of Illinois, 1867, are asked to be taken as a part of this answer.

That said railroad was constructed to and through said town of Harter, from north to south, cutting the corporation of Flora, in said Clay county, and thereupon said railway company became and was entitled to said donation.

That before any tax was levied by said town of Harter, with which to make payment upon said donation, the legislative enactment aforesaid was amended by the legislature of said state, by an act approved February 24th, 1869, entitled "An act to amend an act entitled an act to incorporate the Illinois Southeastern Railway Company," by which amendatory act it was provided, in substance, that certain townships in Clay county which had theretofore voted donations to said railway company, might issue bonds for the same without again submitting the matter to a vote. For greater certainty respecting the provisions of said amendatory act, this defendant refers to same, vol. 3, Private Laws of State of Illinois, 1869,

pages 308–9–10–11–12–13–14 and 15, and ask the same to be made a part of this answer.

That he is informed and believes, and charges the fact to be, that said town of Harter did, strictly in pursuance of said amendatory act, elect and determine to issue bonds for and in satisfaction of said donation, of denomination of $1,000 each, interest 10 per cent., due and payable in twenty years; and that in pursuance of said election said town did, after duly making and issuing said bonds, to wit., on or about the 27th of May, A. D. 1870, issue and deliver said bonds, to the amount of $20,000, to the president of said railway company, cutting off interest
62 coupons to the amount of $150, to cancel accrued interest on said bonds from April 1st, 1870, the date thereof, till May 27th, 1870, the date when said bonds were issued as aforesaid. Does not know whether exhibit "D" is a true and correct copy of minutes of any town meeting held under said amendatory act.

That about the 15th day of December, 1870, he purchased said bonds for a valuable consideration and without notice that there was any irregularities in the issuing thereof, and that he has received interest up to April 1st, 1879; that the bonds were all of like tenor and effect. Charges the fact to be that the bonds, though dated April 1st, 1870, were not issued until the 27th day of May, 1870, when they were delivered to the president of said railway company. Denies that the supervisor and town
63 clerk issued said bonds without warrant or authority of

law, on the 1st day of April, 1870, but says that they were issued on the 27th day of May, 1870.

Admits that the bonds were registered as charged in complainants' bill; says that said bonds were made and issued to the Illinois Southeastern Railway Company, and not to the Springfield and Illinois Southeastern Railway Company, as alleged in said bill, and were properly and legally issued. Defendant says that he does not know whether twenty-five or any number of residents of the town of Harter requested a special town meeting to consider whether said town would levy a special tax or issue bonds to pay said donation, and says that no petition was necessary. Says that the town duly observed the law in making said donation and issue of the bonds; says that he does not know how many legal voters convened to determine whether said bonds should be issued; says that the proposition to issue bonds was unanimously carried by a lawful quorum of the residents and taxpayers of the town.

EXHIBIT "A."

Bond for $1,000 to the Illinois Southeastern Railway Company or bearer, which the township promises to pay at the office of the Treasurer of Clay county, on the 1st day of April, 1890, reserving the right to pay said bond at any time after five years, with interest at the rate of ten per centum per annum, payable semi-annually, on the first days of April and October of each year, on the presentation and surrender of the annexed coupons. The bond recites that it is one of a series issued by said town-

ship in the construction of the Illinois Southeastern Railway, in pursuance of the authority conferred by an act of the general assembly of the state of Illinois, entitled "An act to incorporate the Illinois Southeastern Railway Company," approved February 25th, 1867, and an act amendatory thereof, approved February 24th, 1869, and an election of the legal voters of the aforesaid township, held on the 10th day of November, 1868, under the provisions of said act; in witness whereof the said township of Harter has caused these presents to be signed by its supervisor and countersigned by its clerk, this the 1st day of April, 1870.

Upon the back of said bond is the certificate of the Auditor of Public Accounts, that the bond has been registered in his office, on the 13th day of May, 1870, under the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16th, 1869.

The Springfield and Illinois Southeastern Railway Company, on the 21st day of April, 1870, guaranteed the payment of the principal and interest of the bonds at the American Exchange National Bank, in the city of New York, by virtue of a resolution passed on the 13th day of April, 1870. On the 28th day of May, 1870, C. K. Hendree, supervisor of Harter township, makes before a notary public the preliminary affidavit for the registration of said bonds.

To the defendant's answer there was a general replication.

AGREED STATEMENT OF FACTS.

It was agreed between the complainants and Kernochan, one of the defendants, that the cause should be heard on the bill of complaint, the answer of Kernochan, replication and the following agreed state of facts:

First. That the defendant, John A. Kernochan, is the owner and holder of the twenty bonds, and coupons attached thereto, mentioned in defendant's answer to said bill, and that he acquired the same before due, and paid value therefor, without notice of any defense, except that appearing in the law under which the bonds were issued, and that appearing on the face of the bonds; and that a copy of said bonds, with the indorsements thereon, is correctly set forth as an exhibit to defendant's answer, and marked Exhibit "A." That the supervisor and town clerk of Harter township, on the 1st day of April, A. D. 1870, in behalf of said township signed said bonds; the same having been signed by said supervisor and town clerk, the justices of the peace of said town not being present and took no part or action in the issue thereof. That afterwards, on the 27th day of May, A. D. 1870, said supervisor and town clerk delivered said bonds to the Springfield and Illinois Southeastern Railway Company, and said bonds were by said last mentioned railway company negotiated, and became the property of said J. A. Kernochan. That the supervisor of said town filed the preliminary affidavit, set forth as Exhibit "B" in the defendant's answer, in the office of the Auditor of Public Accounts of the state of Illinois, and that said

bonds were registered in said auditor's office, and that said auditor annually thereafter certified, and there was levied and collected, a tax off of the taxable property of said town, for the purpose of paying the interest on said bonds, and that said tax was paid on said bonds until the filing of complainants' bill. That the Illinois Southeastern Railway Company, on the 3d day of December A. D. 1869, in pursuance of the laws of the state of Illinois, was consolidated with the Pana, Springfield and Northwestern Railway Company, and said consolidated railway company became a corporation under the name and designation of the Springfield and Illinois Southeastern Railway Company; and that, by virtue of said consolidation, succeeded to all the rights of the constituent companies, so far as it was authorized to do by law, and no further; and that said town of Harter, before 1867, was organized as a town under the "township organization laws."

That complainants are citizens of the state of Illinois and taxpayers in said town, and that the said Kernochan is a citizen of the state of Massachusetts, and has been such citizen for the past ten years. That the papers hereto attached and marked "Records" shall be taken and regarded as the records, papers and minutes and files of said town.

(Signed) W. J. HENRY,
Solicitor for Complainants.

(Signed) GEO. A. SANDERS and
N. M. BROADWELL,
for John A. Kernochan, Defendant.

That on the 26th day of August, 1880, the parties submit to the court the motion to remand the cause to the circuit court of Clay county, Illinois, which motion was overruled, and thereupon the case was hear merits and a decree entered dismissing com bill and dissolving the injunction; from the de ruling complainants motion to remand, dism bill, &c., complainants appeal, and assign th errors:

First. The court erred in overruling the remand this cause to the circuit court of Clay linois, for the following reasons:

1st. That said circuit court of the United States had no jurisdiction of said cause.

2d. That the petition, &c., for the removal of said cause was not filed in the state court at the first term thereof, at which said cause could have been tried.

3d. That the petition and bond were not filed in said state court until after a decree had been entered in said cause in said state court.

4th. That there was no controversy existing between the petitioner for the removal of said cause and said complainants.

5th. That the controversy, if any, is not wholly between citizens of different states, nor between the complainants and the parties seeking to remove said cause.

6th. That the parties petitioning for the removal of said cause had not filed certified copies of the record and proceedings in said cause, on the first day of the term of

bonds were registered in said auditor's office, and that said auditor annually thereafter certified, and there was levied and collected, a tax off of the taxable property of said town, for the purpose of paying the interest on said bonds, and that said tax was paid on said bonds until the filing of complainants' bill. That the Illinois Southeastern Railway Company, on the 3d day of December A. D. 1869, in pursuance of the laws of the state of Illinois, was consolidated with the Pana, Springfield and Northwestern Railway Company, and said consolidated railway company became a corporation under the name and designation of the Springfield and Illinois Southeastern Railway Company; and that, by virtue of said consolidation, succeeded to all the rights of the constituent companies, so far as it was authorized to do by law, and no further; and that said town of Harter, before 1867, was organized as a town under the "township organization laws."

That complainants are citizens of the state of Illinois and taxpayers in said town, and that the said Kernochan is a citizen of the state of Massachusetts, and has been such citizen for the past ten years. That the papers hereto attached and marked "Records" shall be taken and regarded as the records, papers and minutes and files of said town.

(Signed) W. J. HENRY,
Solicitor for Complainants.

(Signed) GEO. A. SANDERS and
N. M. BROADWELL,
for John A. Kernochan, Defendant.

That on the 26th day of August, 1880, the parties submit to the court the motion to remand the cause to the circuit court of Clay county, Illinois, which motion was overruled, and thereupon the case was heard upon its merits and a decree entered dismissing complainants' bill and dissolving the injunction; from the decree overruling complainants motion to remand, dismissing the bill, &c., complainants appeal, and assign the following errors:

First. The court erred in overruling the motion to remand this cause to the circuit court of Clay county, Illinois, for the following reasons:

1st. That said circuit court of the United States had no jurisdiction of said cause.

2d. That the petition, &c., for the removal of said cause was not filed in the state court at the first term thereof, at which said cause could have been tried.

3d. That the petition and bond were not filed in said state court until after a decree had been entered in said cause in said state court.

4th. That there was no controversy existing between the petitioner for the removal of said cause and said complainants.

5th. That the controversy, if any, is not wholly between citizens of different states, nor between the complainants and the parties seeking to remove said cause.

6th. That the parties petitioning for the removal of said cause had not filed certified copies of the record and proceedings in said cause, on the first day of the term of

said circuit court, as required by the act of congress of March 3d, 1875, but instead thereof have brought up and filed the original papers which belong to the files of the state court.

Second. The court erred in dismissing complainants bill, for the following reasons:

1st. That the act entitled "An act to incorporate the Illinois Southeastern Railway Company," approved February 25th, 1867, did not authorize and empower said township to vote a donation and issue bonds.

2d. That the proposition made by the Illinois Southeastern Railway Company to the electors of the town of Harter was for a money donation and not for a donation in bonds.

3d. That the election held on the 10th day of November, 1868, and recited in said bonds, did not and could not authorize said township to issue bonds.

4th. That said election of November 10th, 1868, was illegal and conferred no power upon said township to issue bonds.

5th. That the amendatory act of February 24th, 1869, is unconstitutional, and that the bonds attempted to be issued under it are issued without warrant or authority of law, and therefore void.

6th. That the supervisor and town clerk had no authority to issue bonds to the Springfield and Illinois Southeastern Railway Company.

7th. That said bonds were dated on the 1st day of April, A. D. 1870, and registered in the office of the

Auditor of Public Accounts on the 13th day of May, 1870, and that the preliminary oath by the supervisor was not made until the 28th day of May, 1870.

8th. That the bonds were not registered under or in pursuance of the preliminary oath of the supervisor of said township.

9th. That said bonds were not entitled to registration.

Third. The court erred in dismissing complainants bill and in not granting the relief therein prayed.

Fourth. That the court erred in dismissing complainants bill against the state, county and township officers, and vacating the decree of the state court as to them.

Complainants, therefore, pray that said decree overruling the motion to remand said cause and dismissing said bill may be reversed and the cause remanded.

W. J. HENRY,
Sol. for Appellants.

The following sections are the only ones in the acts creating the Illinois Southeastern Railway Company that confer any supposed authority upon towns to vote aid or issue municipal bonds:

AN ACT to incorporate the Illinois Southeastern Railway Company, approved February 25th, 1867.

Section 9. Any town in any county under township organization is hereby authorized and empowered to donate to said company any amount not to exceed thirty thousand dollars; *provided*, that no such donation by any such town to said company shall be made unless the question of making such donation shall have been first submitted to the legal voters of such town, at an election hereafter to be provided for. *And provided, further*, that no donation so made, nor any part thereof, nor any interest accruing thereon or upon any part thereof, shall be paid or become due or payable to said company until said company or its assigns or employees shall have completed their said railroad, or some certain part of said road or its branch, as may have been agreed upon by the contracting parties.

Sec. 10. No such election for the purpose of submitting the question of making a donation by any such town, authorized by section nine of this act, to donate to this company, shall be held until the directors of said company shall have filed a proposition to the inhabitants of said town with the county clerk of the county wherein such town is situate, and a copy of the same with the clerk of

said town, and if there be a newspaper published in such county, said proposition shall be published in full in the same; whereupon it shall be the duty of the clerk of such town to post up written or printed notices of the time and place of holding such election in at least ten public places in such town, together with a copy of said proposition, at least twenty days before the day for holding such election; at which election the legal voters of such township shall vote for or against such proposition, and if a majority of all the votes cast be for such proposition, the trustees of said town shall so certify the same to the clerk of the county court of the county wherein the town is situated; and such county clerk shall, upon the application of the company, after the donation so voted by any such town shall have become due or payable under the terms and conditions of the proposition upon which said election was ordered, compute and assess upon all the taxable property in said town an amount sufficient to pay such donation, or any part or installment of the same so then being due and payable; which taxes so assessed shall be collected as other taxes; and the taxes so collected shall be paid to the treasurer of said company; and the election herein provided for shall be held, canvassed and returned as other regular town elections.

Private Laws, State of Illinois, 1867, vol. 2, pages 753–4.

AN ACT to amend an act entitled "an act to incorporate the Illinois Southeastern Railway Company." Approved February 24th, 1869.

Section 5. And whereas, certain townships in Wayne and Clay counties have voted donations to said railway company, said townships are hereby authorized and empowered to issue township bonds for the amount so donated, without submitting the proposition again to be voted upon; said bonds to be issued in sums not less than one hundred nor more than one thousand dollars each, with interest coupons attached, drawing interest at the rate of ten per cent. per annum, payable semi-annually at the county treasurer's office in each county where such townships are located; said bonds to be payable in five years, or any time thereafter not exceeding twenty years, at the option of the townships; and said bonds to be signed by the supervisors thereof, or by the supervisor or supervisors of the district wherein such township is located, and to be countersigned by the township clerk of the respective townships; and said bonds to be delivered, properly executed, to the president of said railway company, when the conditions are complied with as contained in election notices and propositions submitted to and voted upon by the people of said townships; and said townships shall each, by its proper corporate authorities, provide in due time, by a levy and collection each year of a sufficient tax on its assessed property to pay the interest on its bonds as it accrues half yearly, as aforesaid, and ultimately to provide for the principal of said bonds at maturity. *Provided*, that said bonds shall be placed in the hands of a trustee on the demand of said railway company, as hereinafter provided. *And also, provided*, that such townships may determine, by a vote of their

electors,, at any regular or special town meeting or election, whether they will issue bonds or not in payment of the donations heretofore voted to said company.

Sec. 12. That when payment of subscription to the capital stock of said company, or payments for donations to said company, have been or shall be made by villages, cities, counties or townships, in bonds of such villages, cities, counties or townships, under any act authorizing such subscription or donation to be made, all such bonds issued or negotiated by the proper authorities of such villages, cities, counties or townships, and appearing regular on the face thereof, shall, in the hands of said company or any other *bona fide* holder thereof, be deemed and taken, in all courts and elsewhere, as *prima facie* evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds, or by any other act to be done preliminary to the issuing and negotiation of said bonds.

Private Laws, State of Illinois, 1869, vol. 3, pp 310 & 314.

BRIEF AND ARGUMENT.

The bill was filed by complainants in the circuit court of Clay county, Illinois, for the purpose of enjoining the collection of a tax with which to compensate an issue of bonds and coupons purporting to have been made by the town of Harter to the Illinois Southeastern Railway Company.

The bonds bear date on the 1st day of April, 1870, aggregating $20,000, interest payable semi-annually at the rate of 10 per cent., and recite upon their face that they were issued in pursuance of an act entitled "An act to incorporate the Illinois Southeastern Railway Company," in force February 25th, 1867, and of an election held on the 10th day November, 1868.

The bill makes the state and county officers, whose duty it is to levy and collect the revenue, and the unknown bondholders, parties defendant, and prays for a perpetual injunction, restraining the collection of a tax levied for that purpose.

At the appearance term the defendants were all in court, either by service of summons, waiver of process or by publication, and on the application of the defendants the following order was made by the court and entered of record:

"Town of Harter *et al.* v. Edward Rutz *et al.* Now, on this 13th day leave is given the defendants to file answer to plaintiffs' bill within four months, and this cause is continued therefor."

At the April term, 1879, a decree was entered in said cause, which in substance recites: And now comes this cause on to be heard upon the bill, exhibits, &c., and it appearing to the court that all of the defendants were duly served with process, notified of the pendency of said suit by publication, entered their appearance to said bill and were amenable to the jurisdiction of said court, and that the court had jurisdiction of the subject matter and the person of said defendants, &c.

PETITION TO BE HEARD TOUCHING THE MATTERS OF THE DECREE.

At the April term, 1880, John A. Kernochan filed his petition in the circuit court of Clay county, asking to be heard touching the matters of the decree, and setting forth that he was made defendant to the bill by the name and designation of an unknown person, and that he had not been summoned or served with a copy of the bill of complaint, or received notice of the pendency of said suit; and that he had received no notice in writing of such decree; he therefore asks that he may be heard touching the matters of the decree upon such terms as to the court may seem just, in pursuance of the statute, and prays that upon a further hearing of the cause the court will order that said decree be set aside, altered or amended.

The section of the statute under which this application is made provides, that "when any final decree shall be entered against any defendant who shall not have been summoned or been served with a copy of the bill, or re-

ceived the notice required to be sent him by mail, and such person * * * * shall, within one year after notice in writing is given him of such decree, or within three years after such decree, if no such notice shall have been given, as aforesaid, appear in open court and petition to be heard touching the matters of the decree, * * * the person so petitioning may appear and answer complainant's bill, and thereupon such proceeding shall be had as if the defendants had appeared in due season and no decree had been made. And if it shall appear upon the hearing that such decree ought not to have been made against such defendant, the same may be set aside, altered or amended, as shall appear just; otherwise the same shall be ordered to stand confirmed against said defendant."

The statute has no application to a case where the defendant, after he has been notified by publication, appears and answers, or applies for an extension of the rule to answer. Even conceding that the mere publication was not sufficient to give the court jurisdiction over the defendant, Kernochan, his personal appearance at the November term, 1878, will be construed to have that effect.

Frazier v. Resor *et al.*, 23 Ill., 89.
Abbott *et al.* v. Semple, 25 Ill., 108.

The petition for rehearing nowhere negatives the recitals in the decree that the defendant appeared; the prayer of the petition to be heard touching the matters of the

decree was granted, and Kernochan had leave to answer the bill. Without, however, filing an answer in the state court and tendering an issue, he files his petition and bond praying for the removal of the cause from the state court to the circuit court of the United States, leaving the decree of the state court in full force.

The court having jurisdiction over the person of the defendants and the subject matter, the decree having been entered, and the second term of the court intervening before the application was made for leave to show cause, &c., the power of the court over the case had been previously exhausted and the decree could not, in a summary way, on motion, be set aside.

Cameron v. McRoberts, 3 Wheaton, 591.
Jackson v. Ashton, 10 Peters, 480.
Bridge Company v. Stewart, 3 How., 415.
Cook v. Wood *et al.*, 24 Ill., 296.
State Saving Inst. v. Nelson, 49 Ill., 171.

THE EFFECT OF FILING A PETITION FOR LEAVE TO ANSWER, &c.

Even if we concede the right of the defendant to come in under the provisions of section 19 of the chancery practice (Revised Statute, 1880, p. 189), by so doing he admits the due service of process by publication before the entering of the decree, and that the decree will become operative against him, provided the same is not set aside; and by his own voluntary act in appearing in court he is

estopped from questioning the jurisdiction of the court to pronounce the decree against him and from insisting that the decree is void.

The proceedings under this section of the statute do not authorize the court to vacate the decree upon the presentation of the petition. It simply affords to the defendant the right to be heard touching the matters of the decree. It is only upon the hearing that the decree can be set aside, altered or amended.

Baker *et al.* v. Admr. of Backus, 32 Ill., 95.

WHEN A CAUSE IS REMOVABLE.

Section 3 of the act of March 3d, 1875, regulating the removal of causes from the state courts (R. S. of Illinois, 1880, p. 81), requires that the petition should be filed at the term at which said cause could be first tried, and before the trial thereof. The petition of Kernochan was not filed at the first term that the cause could have been tried; neither was it filed before the trial thereof.

The cause stood for trial and could have been tried at the November term, 1878. It was continued till the April term, 1879, at the instance of the defendants, before any decree was entered therein. The second term after the decree was entered intervened before the making of the application. The right of the bondholder to appear and defend was as complete before the decree was rendered as it has been subsequently. It was a right that he might waive or avail himself of, at his option. So, also, he might waive the right to have the cause removed from

the state to the Federal court. He might have treated the decree against him, provided he had made no appearance in the cause, as a nullity, and have proceeded to enforce the payment of his past due coupons by suit. And according to the settled doctrine of this court, the decree could not be used against him; but when he elected to treat the decree as binding, and the proceeding to bring him into court by publication as legal, on every principle of justice he is precluded afterwards from calling them in question, collaterally. His appearance and the filing of his petition to be heard touching the matters of the decree, have relation to the time when he should have appeared in court, provided he had been duly summoned.

The phrase used in the third section of the act, "before the trial thereof," includes a trial or hearing upon default as well as upon actual litigation. Every trial of a cause is final until, in some form, the decree has been vacated. In the case of Vannevar v. Bryant (21 Wall. 43), the application for removal was made under the act of 27th July, 1866, which provided for the filing of the petition for removal at any time before the final hearing or trial of the suit, and the court there held, that "after one trial the right to a second must be perfected before a demand for the transfer can properly be made. Every trial of a cause is final until in some form it has been vacated. Causes cannot be removed to the circuit court for review of the action of the state court."

Bank v. Turnbull & Co., 16 Wall. 195.

In the act of March 3d, 1875, the word "final" before hearing or trial, as used in the former act, is omitted, so that now the language is, "before or at the term at which said cause could be first tried, and before the trial thereof," which includes an interlocutory as well as a final decree.

Railroad Co. v. McKinley, 99 U. S. 147.
Eible Society v. Grove, 101 U. S. 610.
Removal Cases, 100 U. S. 457.

In the case of Barrow v. Hunton (99 U. S. 82–5), the court say, that "the fact that an action of nullity can only be brought in the court which rendered the judgment, or in the court to which such is appealed, is entitled to some weight in determining the question now under consideration. It shows that in the estimation of the legislature of Louisiana there is manifest propriety in submitting the question of the validity of a judgment to the court which rendered it, or to the court which has the right to revise the judgment by way of appeal."

Duncan v. Gegan, 101 U. S. 812.

In the last case cited the court say, "the transfer of the suit from the state court to the circuit court did not vacate what had been done in the state court previous to the removal. The circuit court, when a transfer is effected, takes the case in the condition it was when the state court was deprived of its jurisdiction. The circuit court has no more power over what was done before the removal than the state court would have had if the suit had re-

mained there. It takes the case up where the state court left it off."

In the case of Brooks *et al.* v. Farwell *et al.*, decided October 20th, 1880, in the United States circuit court, District of Colorado, and reported in "Col. Law Reporter," the court uses this language: "We do not, on the removal of a cause from a court of the state, review or attempt to reverse any proceedings that may have been had there before the removal of the cause into this court. As to all questions that are passed upon in the state court before the removal of the cause, they are fully and finally determined so far as this court is concerned."

The state court in this case, under section 19 of the statute, cited *supra*, had no power or authority to vacate the decree, enjoining the collection of the taxes, that had been entered against the state and county officers.

THE STATE AND COUNTY OFFICERS NECESSARY PARTIES.

By the provisions of the second section of the act of 1875 one of the grounds for removal is, (and it is the one relied on in this case), "when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined between them, then either one or more of the plaintiffs or the defendants actually interested in such controversy, may remove said suit into the circuit court of the United States for the proper district."

By looking into the bill it will be seen that the controversy is not wholly between citizens of different states. At the time of the application for removal the only controversy that existed was the one stated in the bill. The bill at that time being unanswered. For the purpose of the application, the allegations of the bill stood admitted, and two questions by it are presented: first, the legality of the tax and the right of the auditor to levy and certify it under the act of April 16th, 1869, entitled "an act to fund and provide for railroad debts of counties, townships, cities and towns," (R. S. 1880, p. 805); secondly, the legality of the bonds.

To the first controversy the state and county officers were necessary parties, and no decree could be pronounced restraining the collection of the tax without their being made defendants to the bill.

To this controversy the bondholder is not a necessary party; he has no interest in the fund to be raised by taxation, and no claim upon any particular money belonging to the municipality until it is actually paid to him.

Ryan v. Lynch *et al.*, 68 Ill. 165.

Marshall *et al.* v. Silliman *et al.*, 61 Ill. 218.

Story's Eq. Pl., sec. 117.

"The holder of a municipal bond has no vested interest in the tax levied. His remedy, if any, is by *mandamus*."

Leitch *et al* v. Wentworth, 71 Ill. 147.

By the terms of the act incorporating the Illinois Southeastern Railway Company and under which the vote in

this case was taken, no authority was conferred upon the township to issue bonds, and the bonds were not entitled to registration; and this constituted a good ground for making the injunction against the state and county officers perpetual. The registration act requiring, that before bonds should be entitled to registration, the proposition to issue them should be voted for by a majority of all the legal voters living in the township.

Dunnovan *et al.* v. Green, 57 Ill. 70.

Ramsey v. Hoeger, 76 Ill. 435.

The Springfield and Illinois Southeastern Railway Co. v. Cold Spring Tp., 72 Ill. 603.

The amendment to the charter in 1869 provided that the tax should be levied by the corporate authorities of the township.

Private Laws, 1869, sec. 5, vol. 3, p. 310.

A general judgment against the township, if it was liable on the bonds, might be rendered by the court and its payment enforced by a *mandamus*.

U. S. v. Ft. Scott, 99 U. S. 157.

Hitchcock v. Galveston, 96 U. S. 341.

From these premises it follows as a necessary corrollary, that the liability, if any, is general, and the bondholder is not restricted to a special fund out of which to receive his pay, and is not a necessary party to a bill for injunction to restrain the public officer from levying and collecting the tax on the ground that the bonds are ille-

gally issued. The cases are numerous in the state courts that hold, that where public officers, under a claim of right, are proceeding illegally to impair the rights or injure the property of individuals or corporations, or where it is necessary to prevent a multiplicity of suits, a court of equity has jurisdiction to interpose by injunction, and the injunction is directly against such public officers.

Smith v. Bangs *et al*, 15 Ill. 400, and authorities there cited.

Lippincott *et al*. v. Pana, 92 Ill. 26.

"Of the right of the resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property-holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases, and from the nature of the powers exercised by municipal corporations the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere, upon the application of the taxpayers of a county, to prevent the consummation of a wrong, when the *officers of those corporations* assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be

no substantial reason why a bill, by or on behalf of individual taxpayers, should not be entertained to prevent the misuse of corporate powers."

Crampton v. Zabriskie, 101 U. S., 609.

In order to enable the defendant, Kernochan, to remove his cause from the State to the Federal court, under section 2 of the act of March 3d, 1875, it was necessary that the record should show that the controversy was wholly between citizens of different states. In this case there was at the time of the application no existing controversy. A final decree restraining the collection of the tax had been entered, the appearance of Kernochan entered, and the bill as to him remained unanswered. Looking into the record, therefore, it will be seen that there was no controversy. Not a single allegation of the bill was or had been controverted by Kernochan. The fact that he afterwards answered the bill will not aid in conferring jurisdiction upon the Federal court. The state court could not be deprived of its jurisdiction until a controversy either of law or facts presented an issue to be tried. For the purpose of determining the questions as to whom the controversy is with, the court will look into the bill and answer, (where there is one), and will not take the mere statement in the petition that the controversy is between citizens of different states.

The bill charges that the state and county officers are proceeding illegally, and have levied and are threatening

to levy a tax, without warrant or authority of law. The gravamen of the complaint in the bill is against the state and county officers, and the decree as to them finds the allegations of the bill to be true, and perpetually enjoins them from levying or attempting to levy a tax with which to pay the bonds in controversy. The decree as to the state and county officers has not in any manner been attacked, even by Kernochan in his petition. Neither have the state and county officers joined with him in the petition for the removal of the cause from the state to the Federal court. They could not do so, for they are citizens of the same state with the complainants.

The state and county officers are either necessary parties defendant with Kernochan, or the relief prayed for by the bill may be granted against them without impairing his legal rights. The rule is firmly established in this state, that one defendant cannot complain of error that has intervened in a record against another defendant.

Van Pelt v. Danford, 58 Ill., 146.

Gould v. Garrison, 48 Ill., 258.

KERNOCHAN TO FILE A COPY OF THE RECORD.

By the third section of the act of March 3d, 1875, before referred to, the party petitioning for such removal is required to file with his petition a bond, with good and sufficient security for his or their entering, in such circuit

court, on the first day of its then next session, a copy of the record, &c. The defendant, Kernochan, however, instead of complying with this provision of the act of Congress, transfers the original papers, including the petition and bond for removal.

This is not a compliance with the act of congress. It deprives the state court of the files and papers upon which its proceedings are based. It leaves nothing in the state court from which an appellate court could, upon an appeal or writ of error, determine the correctness of the decision of the circuit court in certifying the cause into the Federal court.

THE LEGALITY OF THE BONDS.

The charter for the incorporation of the Illinois Southeastern Railway Company is entitled "An act to incorporate the Illinois Southeastern Railway Company." In force February 26th, 1867.

The only sections of the charter authorizing municipal aid by townships are sections 9 and 10.

See Private Laws of 1867, vol. 2, p. 753.

Under these sections no authority is given to vote a donation or subscription and issue bonds. The only authority to make a donation is one authorizing a money donation, to be raised by taxation.

In fact sections 9 and 10 of the charter, owing to a radical defect in section 10, are incapable, or were incapable,

of conferring any authority whatever upon the township to make the donation and levy the tax.

The defect to which we allude is in this, "and if a majority of all the votes cast be for such proposition, the trustees for the said town shall so certify the same to the clerk of the county court of the county wherein the town is situated, and such county clerk shall, upon the application of the company, compute and assess upon all the taxable property in said town an amount sufficient to pay such donation."

At the time when this charter was passed by the legislature, nor at any time subsequent thereto, has there been any such officer or officers known to the law as trustees for townships under township organization; and it will be seen by reference to the first clause of section 9 of the charter, that it is only townships under township organization that are authorized and empowered to donate, and the maxim, *expressio unius est exclusio alterius* applies.

This question has been directly passed upon by the supreme court of the state of Illinois, in which the court say, that "the law under which the vote was taken, provided the result of the election upon the proposition to make the donation should be certified by the 'trustees of said town' to the county clerk in the county in which the town is situated, before he is authorized to extend the tax to pay the donation. The certificate required by law to be made by the 'trustees of said town' has not and can not be made, for the reasons there are no such officers in

towns organized under the general township organization law."

Springfield & Ill. S. E. R. R. Co. v. County Clerk *et al.*, 74 Ill., 31.

In that case the attempt was made to certify the result of the election by the town clerk, who, it was claimed, was the proper officer to make such certificate. The court say "the answer is, that the town clerk was not authorized by the law under which the vote was taken to certify the result; nor was it his duty by any general law to make any such certification. Being without authority of law, the certificate of the result of the election made by him was an absolute nullity. Hence it cannot be said there was any legitimate evidence in the county clerk's office that an election had been held on * * the 10th day of November, 1868, or at any other time, for the purpose of voting on a proposition to make a donation to the railway company." "The certificate of the town clerk was no evidence of that fact." Ib., 32.

Again, independent of this objection, there is no evidence that there was a substantial compliance with the requirements of these sections in making the propositions by the railway company.

The giving of the notice, the vote and the result of the vote should all appear on record, and the absence of all record evidence upon the files of the town and county clerk's offices devolves the burden of proof upon the plaintiff.

THE RIGHT TO CONTRACT IS LIMITED BY THE RIGHT TO TAX.

The rule is well settled by the Supreme Court of the United States, that in this class of cases the right to contract must be limited by the right to tax; and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

Loan Ass. v. Topeka, 20 Wal., 660.

The validity of a contract which can only be fulfilled by resort to taxation, depends on the power to levy the tax for that purpose. The authorities asserting this proposition are numerous and uniform.

If there had been nothing in the act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the legislature, when it authorized townships to make donations to the Illinois Southeastern Railway Company, to grant full power to tax for the payment thereof.

This implication is, however, repelled by the special provisions contained in the charter, for the manner of making the donation and the levying and collection of the tax is prescribed in the act.

United States v. County of Macon, 9 Otto., 590.

Where the law authorizes the donation of money by municipal corporations to aid in the construction of a railroad, and provides for the levying of a tax to raise the

amount so to be donated, the officers of the corporation cannot adopt any other mode for paying the same, and bonds issued by them for the purpose of paying such indebtedness are void.

Town of Middleport v. Ætna Life Insurance Co., 82 Ill., 562.

Lippincott v. Town of Pana, 92 Ill. 24.

POWER OF THE LEGISLATURE OVER MUNICIPAL CORPORATIONS.

It will not be controverted that within certain prescribed limits the legislature possesses the power to change, modify, or even abolish municipal corporations; but it will be seriously contended that the legislature has no power to create a municipal indebtedness without the consent of the incorporators, (the electors of the municipality); and it follows that the legislature has no power under the constitution to change or vary the terms of a contract previously entered into by a municipal corporation.

The fifth section of the ninth article of our constitution of 1848, in force at the time when the legislation in question was passed, provides that "the corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

The Supreme Court, in giving construction to this sec-

tion of the constitution, say that "we believe that it has always been understood that this clause limited local or corporate taxation to local or corporate purposes, and it has always been so construed whenever its construction has come before this court."

Gaddis v. Richland Co., 92 Ill., 126.

Harward v. St. Clair Drainage Co., 51 Ill., 133.

"No person or class of persons can be safely entrusted with irresponsible power over the property of others, and such a power is essentially despotic in its nature and violative of every just principle of government. It matters not that, as in the present instance, it is to be professedly exercised for public uses, by expending for the public benefit the tax collected. If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority of any kind by those whom they propose to tax, it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause of revolution. We are of opinion that we do no violence to the language of the clause in the constitution we have been considering, by holding that it was designed to prevent such ill-advised legislation as the delegation of the taxing power to any person or persons other than the corporate authorities of the municipality or district to be taxed." Ib., 135.

In the case of Hessler v. The Drainage Commissioners, 53 Ill., 106, it was held that "the corporate authorities, as used in the constitution, must be understood to be those municipal officers who are either directly elected by the population to be taxed, or appointed in some mode to which they have given their assent."

Even earlier in the history of this state a question of vested rights and the power of the legislature, by retrospective legislation, to take the same away, came before the Supreme Court for adjudication, in which it was held that "a statute will not have a retrospective effect given to it unless it clearly appears that such was the intention of the legislature."

"It is a serious question whether the legislature possessed the constitutional power to enact laws of such a character."

Marsh v. Chestnut, 14 Ill., 223.

If there was any contract, even imperfectly entered into, between the railroad company and the town of Harter, it was that the town was to levy three several installments of taxes, making in the aggregate the sum of $20,000, and when collected, donate the same, upon certain conditions, to the railroad company. This was the proposition submitted and voted upon by the electors of the township, and it is the only proposition that ever was submitted or voted upon. Any change of this proposition required the legal assent, the same as was requisite for the acceptance of the original proposition.

It was not competent for the legislature to have conferred the authority to levy the tax and make the donation, originally, upon the supervisor and town clerk, for the reason that the section of the constitution before referred to limited the exercise of the power to the corporate authorities; and if such authority could not have been constitutionally conferred, how can it be conferred by an amendatory act? Certainly it cannot make good, retrospectively, an act which it had previously no power to permit.

Cooley on Con. Limitations, 381.

Kimbal v. Town of Rosendale, 42 Wis., 407.

In the case of Middleport v. the Ætna Life Insurance Co., 82 Ill., 567, where the electors of the township, under the act of March 7th, 1867, had voted a sum of money as an appropriation or donation to the railroad company, to be paid by taxation, it was held by the court that the township never having given their consent to any other mode of payment, that it was not competent for the legislature to confer authority upon the supervisor and town clerk to issue bonds bearing interest. It was a burden the people of the township had never assumed, and no power existed anywhere to impose it upon them without their consent.

"The supervisor and clerk do not represent a township, as a board of trustees represent an incorporated town, or the common council represents a city. They have no power of taxation, no power of themselves to bind the town in any way."

Marshall *et al.* v. Silliman *et al.*, 61 Ill., 225.

In that case, after citing several authorities, the court say that "these cases show it to be the settled doctrine of this court, that under the constitution of 1848 the legislature could not compel a municipal corporation to incur a debt, for merely local purposes, against its own wishes, and this doctrine has received the sanction of express enactment in our existing constitution."

See, also, Wiley *et al.* v. Silliman *et al*, 62 Ill., 171.

In the case of the Township of Elmwood v. Marcy, 2 Otto, 292–3, the cases of Marshall v. Silliman, Silliman v. Wiley, *supra*, were reviewed by the Supreme Court of the United States and followed. The court say that "the Supreme Court of Illinois had decided that the legislature could not compel a municipal corporation, without its consent, to issue bonds or incur a debt for a merely corporate purpose. So far as we can see, the only new point determined in the cases we have first cited is, that it is not competent to single out the supervisor and town clerk and confer on them powers which the constitution limits to the corporate authorities as an aggregate body."

Further along in the opinion the court say, "but are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void, because the laws which authorized their issue were in violation of a particular provision of the constitution of Illinois. We have always followed the highest court of the state in its construction of its own constitution and laws. It is only

where they have been construed differently at different times that, in cases like this, we have adopted as a rule of action the first decision and rejected the last."

THE AMENDMENT TO THE CHARTER OF THE ILLINOIS SOUTHEASTERN R. W. CO.

The amendment to the charter, passed in 1869, under the title of "An act to amend an act to incorporate the Illinois Southeastern Railway Company," (Private Laws, 1869, vol. 3, p. 308), aimed at two distinct purposes: The first was, to legalize certain things that before the passage of the amendatory act had been done; the second was, to confer additional privileges.

By section 5 of the amendatory act, it is provided that "whereas, certain townships in Wayne and Clay counties have voted donations to said railway company, said townships are hereby authorized and empowered to issue township bonds for the amount so donated, without submitting the proposition again to be voted upon; said bonds to be signed by the supervisors thereof, or by the supervisor or supervisors of the district wherein such township is located, and to be countersigned by the clerks of the respective townships."

This section is liable to several grave objections. 1st. It makes the legislature assume a judicial function, and find, as a fact, that certain towns in the counties named have voted in a particular way. 2d. It impairs the obligation of a contract entered into by the township with

the railroad company, which was, that in consideration that the railroad company would construct their road in a certain manner, then that the township would make a money donation of $20,000, to be raised by taxation, into a donation for $20,000 founded upon an issue of bonds bearing ten per cent. interest. 3d. It attempts to take the power to alter the contract away from the people and the corporate authorities, and confer it upon the supervisor and town clerk, who are not the corporate authorities.

"The will of the people of the township can only be expressed," says our Supreme Court, "through corporate meetings duly convened in accordance with the requirements of the law, and there is no authority under section 5, of article 9 of the constitution of 1848, for delegating the power to any officer or set of officers."

"The electors only represent the township, and they in doing so must and do necessarily act through town meetings. The election being illegal and void, under which the vote recited in the bonds in this case was taken, it is impossible to say that in any view the result can be regarded as the assent of the corporate authority of the town to the proposition submitted. The corporate authority of the town, (the electors) must and can only act when called together in obedience to the law; and when not thus called together, it is obvious any action by them can at best amount to no more than the action of a mass meeting. The supervisor and town clerk, neither separately nor as-

sociately, are the corporate authority of the town; they are simply town officers with limited duties to perform in respect to town affairs, whom the law has appointed to discharge a ministerial duty, in obedience to the direction of the town authority. They possess no power, either as town officers or under the statute, except under the direction of the corporate authority of the town, to do any act in regard to making the subscription or issuing the bonds."

Williams v. Town of Roberts, 88 Ill., 22–23.

"The township committee are not the corporation; the inhabitants of the township are the corporation, and they act not through the committee as managers or directors, but by vote of the inhabitants assembled in town meeting. By the twelfth section of the township act the town committee are to audit the accounts of the township officers, and are to direct the expenditure of the money raised for the township's purposes, but they have no power to raise any tax or to bind the township by borrowing money."

Musgrove v. Kennell, 23 N. J. Eq., 77.

THE POWER OF THE LEGISLATURE TO PASS CURATIVE ACTS.

If there is any one thing well and uniformly settled by the Supreme Court of the state of Illinois, it is that it is not competent, by retrospective legislation, to ratify a void tax. As early as 1852 it was decided, Judge Treat delivering the opinion of the court, that "it is a sound and

inflexible rule of law that when special proceedings are authorized by statute, by which the estate of one man may be divested and transferred to another, every material provision of the statute must be complied with. The owner has the right to insist upon a strict performance and upon all the material requirements, and especially of those designed for his security, the non-observance of which may operate to his prejudice."

Further on in the opinion it is said, "but if the provisions in these statutes are to retroact upon the proceedings, the case is entirely changed; what before was insufficient to pass the title becomes competent for the purpose. The objection upon which the owner confidently relied for protection is entirely swept away by *ex post facto* legislation. Legislation of this kind may well be characterized as replete with injustice."

Marsh v. Chestnut, 14 Ill., 227.

See, also, Wier v. Hahn, 15 Ill., 298.

In the case of Marshall v. Silliman, before referred to, an attempt was made to legalize an issue of $15,000 of bonds by a curative act, and the court say, "our conclusion is, that the so-called curative act was a violation of the constitution. Its object was to compel this town to issue its bonds for railroad stock independently of its own wishes, and this was beyond the limits of legislative power. It sought to accomplish this by declaring that a void proceeding was a valid one; that a vote confessedly

illegal was in fact legal. But this vote was an accomplished fact. Whether it was within the corporate powers of the town and binding upon its people was a question which no subsequent legislation could affect; and when the legislature undertook to say that this vote created a valid obligation against the town, when it did not, it was attempting by its own act to create a corporate debt."

This same question arose in the case of the Town of Middleport v. the Ætna Life Insurance Co., *supra*. In that case the electors of the township, under the act of March 7th, 1867, had voted a sum of money as a donation to the railway company, to be paid by taxation. They never gave their consent to any other mode of payment; "and if," says the court, "the object of the later statute was to compel the township to issue interest bearing bonds in liquidation of such aids, it was beyond legislative powers. It was a burden the people of the township had never assumed, and no power existed anywhere to impose it upon them without their consent."

In the case of Williams v. the Town of Roberts, *supra*, the court say, "the act of April 17th, 1869, then rests solely on the power of the legislature to create a debt against the town without the consent of its corporate authority. That consent had not been given anterior to the passage of the act. It was not required, nor has it been given posterior to its passage, and hence, upon the authority of the cases referred to, it was invalid, because beyond legislative competency."

Further on the court say, "the result in neither case required any action of the corporate authority of the town (the electors) on the question which the law will recognize. In both cases the legality of the subscription and the issue of bonds rest solely upon the act which assumes to validate them."

See, also, to the same effect, Barnes v. the Town of Lacon, 84 Ill., 461.

Gaddis v. Richland County, 92 Ill., 126.

Harward v. Drainage Co., 51 Ill., 130.

People v. Mayor of Chicago, 51 Ill., 30.

Hessler v. Drainage Com'rs, 53 Ill., 110.

Lovington v. Wider, 53 Ill., 302.

Wiley v. Sillman, 62 Ill., 170.

This rule of constitutional construction, founded on section 5 of article 9 of the constitution of 1848, was adopted before the issue of the bonds in controversy, and has been steadily adhered to from that time forward.

It has also, in the case of the Town of Elmwood v. Marcy, *supra*, received the assent of the Supreme Court of the United States.

THE BONDS WERE ISSUED TO THE SPRINGFIELD AND ILLINOIS SOUTHEASTERN RAILWAY COMPANY.

By the consolidation of those two companies into one the original companies, as we have previously seen, ceased

to have a corporate existence, and the merging of the two created a new corporate legal entity.

R. R. Co. v. Georgia, 98 U. S., 360.

The election held on the 20th day of May, 1870, and after the bonds were issued, purports to have been held under section 5 of the amendment to the charter of the Illinois Southeastern Railway Company, for the purpose of paying off a donation in bonds previously made to that company. At the time of the holding this election the Illinois Southeastern Railway Company had surrendered its charter back to the people of the state of Illinois and ceased to exist as a corporation. It is at least intimated by this court, in the case of the *Town of Empire v. Darlington*, 101 U. S., 92, that such a proceeding would confer no authority. In that case the court say, "if the popular vote had been in terms in favor of a subscription to the capital stock of the Danville, Urbana, Bloomington and Pekin Railroad Company, and the subscription had been made in that form, then there would be some reason to contend that the subscription would have been a nullity, since no such company then had a distinct separate existence.".

The Springfield and Illinois Southeastern Railway Company was created by the consolidation of the Illinois Southeastern Railway Company with the Pana, Springfield and Northwestern Railroad Company, in February, 1870, and before the bonds in controversy purport upon

their face to have been issued. The bonds recite that they were issued under the act to incorporate the Illinois Southeastern Railway Company, in force February 26th, 1867, and under an act to amend an act entitled "An act to incorporate the Illinois Southeastern Railway Company," in force February 24th, 1869, and by virtue of a certain election held in said township on the 10th day of November, 1868.

It is true that the bonds are made payable to the Illinois Southeastern Railway Company, and were issued long after that corporation had ceased to exist, surrendered its franchise and gone out of existence. The bonds were issued to the Springfield and Illinois Southeastern Railway Company, and showed their invalidity upon their face.

If this was not the fact, however, the false recitals would not avail to protect the bonds, even in the hands of *bona fide* holders, for the reason that the amendment to the charter itself provides, that "when payment * * for donation to said company * * by townships, under any act authorizing donation to be made, all such bonds issued or negotiated by the proper authorities of the townships and appearing regular on the face thereof, in the hands of said company, or any other *bona fide* holder thereof, shall be deemed and taken, in all courts and elsewhere, as *prima facie* evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds, or by any other act to be done preliminary to the issuing and negotiation of said bonds."

Private Laws, 1869, vol. 3, p. 314.

It will be seen by a glance that the rule of the Federal courts in regard to the legal effect of recitals, making such recitals conclusive evidence, where the bonds have been negotiated and are in the hands of *bona fide* holders, conclusive of the legality of all the preceding and preliminary requirements essential to the issuing of the bonds, has been changed by the act itself, before referred to, and they are now but *prima facie* evidence.

The evidence and agreed state of facts are conclusive that the bonds were issued after the consolidation before referred to, by the supervisor and town clerk, without any corporate action by either the board of town auditors or the electors of the town; and we propose to consider in this connection the effect of consolidation upon the rights of the supervisor and town clerk to make the donation and issue the bonds to the consolidated company.

"The effect of consolidation, when completed, destroys the constituent companies, and a new one is created, and their powers are granted to the new corporation in all respects, in view of the law, as if the old companies had never existed and neither of them had ever enjoyed the franchise so conferred."

Shields v. Ohio, 5 Otto, 323.

Clearwater v. Meredith, 1 Wal., 25.

The rule is well settled that bonds voted to one rail-

road company cannot be issued and delivered to another.

Town of Big Grove v. Wells, 65 Ill., 264.

Ill. G. T. R. R. Co. v. Cook, 29 Ill., 243.

Marsh v. Fulton Co., 10 Wal., 681.

It has also been settled by the Supreme Court of the United States that "although a subscription for stock of a railroad company be duly authorized by the requisite number of the qualified voters of a township, if the company, before the subscription be actually made, becomes consolidated with another, thereby forming a third, the county court is not empowered to subscribe in behalf of the township to the stock of the new company and issue bonds in payment thereof."

Harshman v. Bates Co., 2 Otto, 574.

In the case of the County of Scotland v. Thomas, 4 Otto, 691, the case of Harshman v. Bates Co., *supra*, came before the Supreme Court for review, and the rule there laid down was this, that "authority given to a person to be exercised for his own benefit and at his own discretion, may be exercised by him under changes of circumstances that would amount to a revocation of a power given to an attorney, unless it expressly conferred discretion." But where the officers act as the mere agents of the township, having no discretion to act beyond the precise terms of the power given, consolidation operates as a revocation. In that case the county court of Scotland

county had complete representative authority in behalf of the county itself, and was "officially invested with all the discretion necessary to be exercised under the change of circumstances brought about by the consolidation in question; for, as before remarked, the county court, in reference to the subscription in question, represented the counties themselves as their officially constituted authorities. This is distinctly stated by the Supreme Court of Missouri in the case of the Hannibal and St. Joe R. R. Co. v. Marion Co., 36 Mo., 303."

In the case of Wilson v. Salamanac, 9 Otto, 504, it was said by the court, that "the township trustees and the township clerk who made the subscription and issued the bonds in this case, were the officially constituted authorities of the township, and when they subscribed to the stock and issued the bonds they acted in their official capacity as the legal representatives of the township, and not as mere agents. In this particular they occupied the position of the county court in the Scotland County case. They were to all intents and purposes the township in its corporate capacity. In Harshman v. Bates Co., 92 U. S., 569, the case was different."

In view of the authorities contained in the decisions of the State and Federal courts, it will not be claimed that the supervisor and town clerk are the corporate authorities of the township, or that they are clothed with any discretion over the township to materially change the rights of the township as they existed under the original

charter at the time the vote of the township, as recited in the bonds, was taken.

NO DONATION BY THE TOWN.

There is no evidence that the town of Harter ever made a donation to the Illinois Southeastern Railway Company; certain it is that the proceedings initiated for that purpose were incapable of effectuating the object. The defect in the law itself rendered it impossible. Again, there is no evidence that the Illinois Southeastern Railway Company complied with the requirements contained in the charter.

Section 10 of the charter provides that "the directors of said company shall file a proposition to the inhabitants of said town with the county clerk of the county wherein such town is situate, and if there be a newspaper published in such county, said proposition shall be published in full in the same; and that the clerk of such town shall post notices of the time and place of holding such election in at least ten public places in such town, together with a copy of such proposition, at least twenty days before the day of holding such election."

Lippincott *et al.* v. Town of Pana *et al.*, 92 Ill., 27.

There is an entire absence of evidence showing that the essential statutory requirements were complied with. There is nothing in the 5th section of the amendatory act of the charter of the Illinois Southeastern Railway Company to indicate that this is one of the townships that

had previously made donation to the Illinois Southeastern Railway Company. The language of section 5 of the amendatory act is, "And whereas certain townships in Wayne and Clay Counties have voted donations to said railway companies, said townships are hereby authorized and empowered to issue township bonds for the amount so donated without submitting the proposition again to be voted upon," &c.

The plain inference from the language employed is, that the donations referred to were unconditional donations; whereas the proposition made by the Illinois Southeastern Railway Company to the town of Harter was, that the town donate $20,000 to said company on the following terms: one-third when said railway company should have graded and tied their railroad through the township from north to south, touching the town of Flora, the amount to be raised by special tax levied for that purpose, and collected in the year 1869; one-third when said railroad was timbered and ready for the iron, and one-third when the road should be fully completed, the same to be levied and collected in the year 1870-1 and paid over to the treasurer of said railway company.

Under this proposition the town was not empowered to make the donation until the road was located and constructed through the town; and it will scarcely be contended that the town did not have authority to prescribe the conditions. In fact, it is expressly provided by the registry act of April 16th, 1849, that "any county, town-

ship, city or town shall have the right, upon making such subscription or donation to any railroad company, to prescribe the conditions upon which such * * * subscription or donation shall be made; * * * and subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with."

R. S. of Illinois, 1880, sec. 7, p. 807.

Town of Concord v. Savings Bank, 92 U. S., 630.

NOTICE BY RECITALS.

The parties dealing in these bonds had notice by the recitals of their invalidity. No authority was conferred by the act under which the vote was taken to issue municipal bonds, and certainly by the guarantee on the back of the bonds by the Springfield and Illinois Southeastern Railway Company, the holder or purchaser had notice that they were made payable to one company and issued to another. Even the authority attempted to be conferred by the amendatory act to the charter of the Illinois Southeastern Railway Company was made subsequent to the holding of the special election recited in the bonds, and did not attempt to confer the power to issue bonds upon the corporate authorities of the township, but expressly provided that the bonds should be issued by the supervisor and town clerk, or by the supervisor or supervisors of the district wherein such township is located, and to be countersigned by the clerk of the township. The super-

visor had no inherent power or authority to bind the township. The authority conferred upon them was a delegated authority. In other words, they are made by the express provisions of the amendatory act merely the agents of the township to execute the bonds. The act of consolidation under such circumstances operated as a revocation of the authority conferred upon the township to make the donation, and the consolidated company had no authority to receive the bonds, and the holders thereof were chargeable with notice.

Harshman. v. Bates Co, 92 U. S., 574.

R. R. Co. v. Georgia, 98 U. S., 360.

Clearwater v. Meredith, 1 Wall., 40.

Lawman v. Lebanon Val. R. R. Co., 30 Pa. St., 42.

McMahan v. Morrison, 16 Ind., 172.

Ohio v. Sherman, 22 Ohio St., 411.

Shields v. Ohio, 26 Ohio St., 86.

The acts in pursuance of which the bonds are claimed to be issued are public statutes of the state, and all persons dealing in the bonds are chargeable with a knowledge of what the acts contain; and as the supervisor and town clerk who issued the bonds were acting under delegated authority, they must show that the authority has been properly conferred. The court must, therefore look into the statute for the purpose of determining this question.

Knox Co. v. Aspinwall, 21 How., 543.

In the case of the U. S. v. County of Macon, 99 U. S., 590, this court say, that "every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gave no power to make the bond the municipality is not bound."

We may now take it for granted that dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement.

Royal British Bank v. Tarquand, 6 Ellis & Black, 327.

Harshman v. Bates Co., 92 U. S., 575.

In an early case it was held by the Supreme Court of the United States that "the act of incorporation is to them an enabling act. It gives to them all the power they possess. It enables them to contract, and when it prescribes to them a mode of contracting they must observe *that mode*, or the instrument no more creates a contract than if the body had never been incorporated."

Head & Amboy v. Providence Ins. Co., 2 Cranch, 127.

In the case of Baty v. Knowler's Lessees, 4 Peters, 169, it was held that "a corporation is strictly limited to the exercise of those powers which are specifically conferred upon it. It will not be denied that the exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation. Being the mere creature of the law, it possesses those properties which the charter of its creation confers, and none other."

Dartmouth College v. Woodward, 4 Wheaton, 636.

Bank of Chillicothe v. Swayne, 8 Ohio, 287.

Trustees of Jacksonville v. McConnell, 12 Ill., 140.

In this case, taking the face of the bonds and the law under which they purport to be issued, the court, we insist, cannot escape the conclusion that the bonds are void; That they were issued without corporate authority to the consolidated company, and that the purchaser or holder had notice of their invalidity. It is the settled doctrine of this court, that if the facts be recited on the face of the bonds themselves by the proper municipal authorities, the municipality is estopped from questioning their validity, and the rule of estoppel is, that it must be reciprocal. If the recital operates as an estoppel where such recital validates the bonds, the converse of the proposition is equally true, that where the recital establishes the invalidity of the bonds extrinsic evidence is not receivable in favor of the bondholder to establish their validity, and the election held on the 20th of May, 1870, and after the bonds were issued, will not aid them.

Forey v. the Bank of Orleans, 9 Paige Ch., 658.

Welland Canal Co. v Hathaway, 8 Wend., 484.

Viner's Abridg., Title Estoppel, 463.

Londale v. City of Portland, 1 Oregon, 381.

For these reasons we insist that the court erred in maintaining jurisdiction of the cause, vacating the decree of the state court and dismissing complainants' bill, and that the decree should be reversed, with directions to remand the same to the state court.

W. J. HENRY, G. A. HOFF,
Solicitors for Appellants.

United States Supreme Court.

OCTOBER TERM, A. D. 1880.

NO. 999.

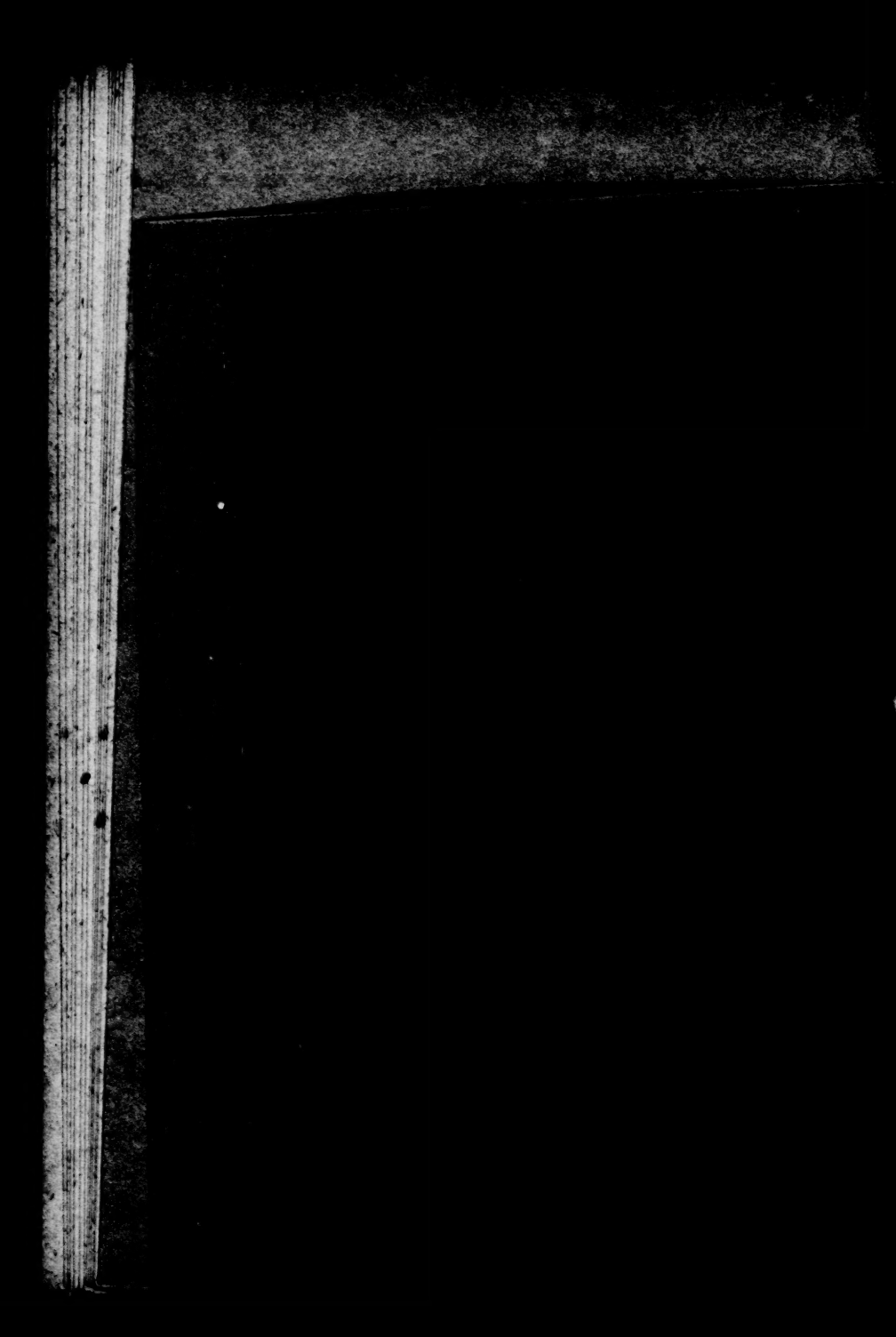
TOWN OF HARTER, *et. al.*

vs.

EDWARD RUTZ, *et. al.*

STATEMENT AND BRIEF.

GEORGE A. SANDERS,
Solicitor for Appellee



IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, A. D. 1880.

THE TOWN OF HARTER, *et. al.*
vs.
EDWARD RUTZ, *et. al.*

Appeal from the Southern District of Illinois

STATEMENT.

On the 10th day of November, 1868, the voters of Harter Township, Clay County, Illinois, held an election, to determine whether that township would donate $20,000 to aid in the construction of the Illinois Southeastern Railway Co., on a proposition submitted by the Directors of the Illinois Southeastern Railway Co. to the legal voters of Harter Township, Clay Co., Ill., as provided for in the charter of said railway company.

The vote was found, when canvassed, to be, "*For Donation*," 300 ballots; "*Against Donation*," 42 ballots.

On the 10th day of May, 1870, an application for a special town meeting of Harter Township, Clay Co. Ill., was filed in the office of the Town Clerk, as the law directs, for the purpose of voting whether to levy a special tax to pay off the donation of $20,000 made to the Illinois Southeastern Railway Co. at the election of Nov. 10, 1868, or to issue township bonds to pay off said donation. The election was held pursuant to the

call, on the 20th day of May, 1870, and resulted in 79 votes being cast for the issuing of the bonds, and *none* for levying a special tax.

In accordance with these elections, twenty Harter Township, Clay Co., Ill., bonds, for $1,000 each, dated April 1, 1870, with interest at ten per cent. per annum, payable April and Oct. 1st annually, at the office of the Treasurer of Clay County, Illinois, were issued The bonds running for twenty years, but payable at the option of the Town of Harter after five years, and signed by C. K, Hendee, Supervisor, and L. A. Michels, Town Clerk. The records of the Town Clerk show that "May 27, 1870, the "above bonds were this day properly signed and turned over to Thomas "S. Ridgeway, President of said railway company, taking his receipt for "the same. Three coupons were also cut off, being one hundred and fifty "dollars ($150) of the interest on said bonds."

These bonds were duly registered in the office of the Auditor of Public Accounts of the State of Illinois, May 31, 1870. That they were guaranteed by the Springfield and Illinois Southeastern Railway Co., through Thomas S. Ridgeway, its President, April 21, 1870.

The $20,000 of Harter Township Bonds in controversy in this suit were purchased soon after their issue by John A. Kernochan, one of the defendants herein, a citizen of Massachusetts, for a good and valuable consideration, and have been held and owned by him ever since. That the interest for ten years, or thereabouts, has been promptly paid twice a year to said Kernochan or his agents, with no notice whatever of any legal or equitable defense against said bonds.

That these bonds were issued under an Act of the Legislature of the State of Illinois, dated February 24, 1867, incorporating the Illinois Southeastern Railway Company, and an amendatory Act, dated February 24, 1869, and were issued in aid of the Illinois Southeastern Railway Company, and guaranteed April 21, 1870, by the Springfield and Illinois Southeastern Railway Company.

That the Illinois and Southeastern Railway Company was consolidated with the Pana, Springfield and Northwestern Railway Company on or about December 3, 1869, and the title was changed to the Springfield and Illinois Southeastern Railway Company.

The case at bar was commenced by Bill in Chancery, filed in the Clay County Circuit Court, State of Illinois, September 3, 1878, in which the Town of Harter, Clay Co. Ill., *et al.* are complainants, and Edward Ruth, then State Treasurer of Illinois; and Thos. B. Needles, then Auditor of the State of Illinois; Richard J. Brenn, Clerk of the County of Clay, Illinois; Edward A. Hawkins, then Treasurer of Clay County, Illinois; John

Lawrence, Collector of Harter Township; Rolla B. Henry, as Supervisor of said Township; J. W. Anderson, as Clerk of that Township; and Jerry Lawrence and Jerry F. Wilcox, two Justices of the Peace; and *the Unknown Holders and Owners of the said* $20,000 *of Bonds and Coupons* are made parties defendant, and the bill is sworn to before G. A. Hoff, County Judge of Clay County, Illinois, and one of the Attorneys of Record in this case.

The Bill asks for an injunction against the officials of Harter Township, and those of Clay County, and those of the State of Illinois, interested by law in making a levy and collecting the taxes for the payment of any part of the interest and principal of these $20,000 of bonds under the laws of Illinois, and, that on a final hearing of said bill, that such injunction be made perpetual, and that the alleged unknown holders and owners of said $20,000 of bonds be enjoined from negotiating, selling or disposing of the bonds, and that they be ordered to bring them into court for cancellation, because of the alleged absence of the requisite power legally to issue them.

An injunction was granted by the Master in Chancery, during the absence of the Judge of the Circuit Court of Clay County, Illinois, as is alleged, and the levy and collection, and payment of interest on said bonds was thereby prohibited, the bonds not being due until 1890.

On this bill a decree was entered *pro confesso*, May 2, 1879, by the Judge of the Circuit Court of Clay County, Illinois. All the defendants being merely ministerial officers, nominal parties, and not of interest in the said suit, except John A. Kernochan, the alleged unknown holder and owner of the whole issue of the $20,000 of Harter Township Bonds, who knew nothing of the pending of said bill, or the proceedings thereunder, until the September following, and was made party only by publication as The Unknown Holder or Owner of said Bonds, in a local paper published in, Louisville, Illinois.

On the 17th day of March, 1880, John A. Kernochan, the owner and holder of the bonds in issue, appeared in the Clay County Circuit Court, then in regnlar session, through his attorney, Geo. A. Sanders, and filed his petition to have the cause placed upon the docket, and for such other relief as the statute of Illinois provides. This petition was granted, and the cause placed upon the docket. He then filed his written motion to open said decree, and for such relief as the statute in such cases provides. *This motion was allowed.* He then filed his petition to remove the cause to the United States Circuit Court for the Southern District of Illinois, and tendered his bond, as the statute of the United States requires, which being approved, the Judge ordered the Clerk to certify the cause to the

United States Circuit Court for the Southern District of Illinois, holden at Springfield, Illinois.

The petition to place upon the docket this cause, in the Clay County Circuit Court, was sworn to by John A Kernochan. This petition, and the motion to open the decree, and the petition for removal to the Federal Court, and the filing of the bond, were all made in open court, and in the presence of C. K. Chesley and G. A. Hoff, Attorneys of Record in this cause, and who appeared for complainants and inspected all of the papers offered by the defendant, and heard them read in open court, and did not interpose any objections to the rulings of the Court thereupon.

The cause was duly certified to the Federal Court, and on the 8th day of June, at the June Term of the Federal Court, the counsel for appellants filed their motion to remand the cause to the Clay County Circuit Court, State of Illinois. This motion was argued by counsel on the 26th day of August, 1880, and was overruled by the Federal Court and the cause was submitted for final hearing upon bill, answer, replication, proofs and argument of counsel, and the Court ordered and decreed that the bill of complainants be dismissed, and the injunction dissolved, and that complainants pay the cost of this proceeding, both in the Federal Court and in the Clay County Circuit Court, in which it originated.

From this decree the complainants have appealed, September 8, 1880, to the Supreme Court of the United States.

BRIEF OF GEORGE A. SANDERS, COUNSEL FOR JOHN A. KERNOCHAN.

The Illinois Southeastern Railway Company was incorporated by an Act of the Legislature of the State of Illinois, in force February 26th, 1867.

Private Laws Ill. 1867, vol. 2, page 750.

Among other provisions in the act of incorporation is one authorizing "any township, in any county under township organization, to donate to "said company any amount not to exceed $30,000. *Provided*, that no "such donation by any such town to said company shall be made, unless "the question of making such donation shall have been first submitted to "the legal voters of such town at an election hereafter to be provided "for." Etc.

Sec. 9, vol. 2, Private Laws Ill., page 753.

It also provides in Sec. 10, same Act and page, *supra*, that "no such "election for the purpose of submitting the question of making a dona- "tion by any such town, authorized by Sec. 9 of this Act, to donate to

"this company, shall be held until the Directors of said company shall "have filed a proposition to the inhabitants of said town with the County "Clerk wherein such town is situate, and a copy of the same with the "Clerk of said town." * * *

In accordance with the express terms of this statute a proposition was submitted to the legal voters of the Town of Harter, Clay County, Illinois (then a township under township organization. See agreement, page 32, Transcript of Record.) by the Directors of the Illinois Southeastern Railway Company, to be voted upon at an election to be held in said town on the 10th day of November, 1868. This proposition was, that the Town of Harter, Clay County, Illinois, donate $20,000 to the Illinois Southeastern Railway Company; one-third of said $20,000 to be raised and paid by a special tax, for that purpose levied and collected from the taxable property of Harter Township, Clay County, Illinois, in the year 1869, and paid to the Treasurer of the Illinois Southeastern Railway Company as soon as the same was collected, subject to certain conditions therein specified; one-third to be levied, collected and paid in the year 1870, and the remaining one-third to be levied, collected and paid in the same way in the year 1871.

Page 33. A Proposition. Transcript of Record.

Said proposition also provides (2) "that if the requisite legislation could be obtained from the next session of the ensuing Legislature of the State of Illinois, authorizing and empowering the Town of Harter to issue township bonds payable in five years, or a time thereafter not exceeding twelve years, at the option of the Town of Harter, bearing interest at the rate of ten per cent. per annum from date of delivery of said bonds to the railway company."

This proposition also provides "that in the event the said Illinois Southeastern Railway Company shall take and receive the said amount of $20,000, in the bonds of said Harter Township, *in lieu* of the amount to be raised by taxation, as provided for in the first clause of said proposition, and in case the said tax shall not be levied, that the Treasurer of said railway company *shall be compelled to receive said bonds in lieu of and in discharge of said tax.*"

Transcript of Record. A Proposition. 2nd, page, 33.

This proposition was submitted to the legal voters of Harter Township, on a notice for an election called by the Clerk, J. M. Billings, and dated at Flora, October 20, 1868, to be held on the 10th day of November, 1868, at the office of E. L. Howells, Flora, Clay County, Illinois, for the purpose of accepting or rejecting this proposition.

Exhibit B, page 9, Transcript of Record.

The result of this election was, "For Donation," 300 ballots; "Against Donation," 42 ballots.

Exhibit C, page 9, Transcript of Record.

Under this proposition, and the election held November 10, 1868, more than five-sixths of the voters favored the proposition, which was to donate $20,000 to said railway company *or issue that amount of township bonds.* We claim that the submission of this proposition, and the election of November 10, 1868, being strictly in accordance with the law of February 24, 1867, (sections 9 and 10), and a fair vote of the people on the questions therein contained, the authority was ample for the issuing of the bonds by the proper township officers, without any other election. This Act and the election of November 10, 1868, are cited on the face of the bonds, and in the hands of an innocent holder are thereby good.

Town of Coloma vs. Eaves; 2 Otto, page 484.

Town of Venice vs. Murdock; 2 Otto, page 494.

In 2d Otto, page 629, Town of Concord *vs.* Savings Bank, this Court says: "that a popular election having been held, and a majority of the "votes having been in favor of the appropriation, it may be conceded "that payment of the appropriation could lawfully have been made in "town bonds instead of money, if the donation itself was authorized; "the real question is, whether the authority to make the donation existed "when it was made."

In the case at bar there is no question as to the anthority to make the donation, and we think none as to the right to issue the bonds in lieu of the money.

Commissioners of Douglas County vs. Bolles; 4 Otto, page 104.

Commissioners of Johnson County vs. Jannary; 4 Otto, page 202.

But the requisite legislation referred to in the proposition from the Directors, submitted to, and voted upon at the election of November 10, 1868, (Exhibit A, page 9, 2nd Transcript of Record) was obtained at the following session of the Legislature of Illinois, and another election was held before the bonds in question were issued and delivered by the Town of Harter.

An act was passed by the Illinois Legislature, in force February 24, 1869, entitled an act to amend an act entitled, "An Act to incorporate the Illinois Southeastern Railway Company." Private Laws of Illinois, 1869, vol. 3, pages 308 to 315.

In this Amendatory Act, Sec. 5, page 310, it provides that "Whereas, "certain townships in Wayne and Clay Counties have voted donations" (one of which was Harter Township), "to said railway company, said "Townships are hereby authorized and empowered to issue Township "Bonds for the amount so donated *without submitting* the proposition "again to be voted upon. Said bonds to be issued in sums of not less "than $100 nor more than $1,000 each, with interest coupons attached, "drawing interest at the rate of ten per cent. per annum, payable semi-"annually at the County Treasurer's Office in each county where such ".townships are located. Said bonds to be payable in five years, or any "time thereafter, not exceeding twenty years, at the option of the town-"ships, and said bonds to be signed by the Supervisors thereof; or by the "Supervisor or Supervisors of the district wherein such township is located, "and to be countersigned by the Township Clerk of the respective town-"ships, and said bonds to be delivered, properly executed, to the Presi-"dent of said railway company, when the conditions are complied with "as contained in the election notices, and propositions submitted to and "voted upon by the people of said township." * * * And also provides, "that such townships may determine by a vote of their electors "*at any regular or special town meeting, or election, whether they will issue "bonds or not, in payment of the donations heretofore voted to said "company.*"

Section 10 of the Act of February 24, 1869, page 312, Private Laws Illinois, vol. 3, provides, "That whenever *twenty legal voters* of any such "city, village, county or township shall present to the Clerk a written ap-"plication requesting that an election shall be held to determine whether "such city, village, county or township shall subscribe to the capital stock "of said company, or make donation thereto," etc. * * *

In strict compliance with the statute last quoted, and upon the application in writing of the Supervisor, C. K. Hendee, Town Clerk L. A. Michels, Cuningham and Wilcox, Justices of the Peace, and twenty-one freeholders, as the law requires, the Town Clerk calls a special town meeting on the 20th day of May, 1870, "for the purpose of voting whether to levy "a special tax to pay off the donation of $20,000 made to the Illinois "Southeastern Railway Company by said town, at an election held for "that purpose, or issue bonds to pay off the above donation."

All the officers of Harter Township, which constitute the corporate authorities, signed this application for a special town meeting; with the requisite number of freeholders and one more. Transcript of Records, pages 34 and 35.

The result of this special town meeting was 79 *votes* for bonds and *none* for special tax. Transcript of Record, page 35.

Twenty bonds of Harter Township were issued, for $1,000 each, with semi-annual interest at the rate of ten per cent. per annum, payable at the office of the Treasurer of Clay County, Illinois, and dated April 1, 1870, and signed by C. K. Hendee, Supervisor, and S. A. Michels, Clerk, as the law required. Act Feb'y 24, 1869, Private Laws of Illinois, vol. 3, 1869, Sec. 10, page 313.

Copy of Bond No. 1 is found in Exhibit A., page 29, of Transcript of Record.

All of the other bonds are similar save as to the number of the bond.

It is a fact, admitted and in evidence, that these bonds, though dated April 1, 1870, *were not issued and delivered until May* 27, 1870. (Agreement Transcript of Record, page 32, and Records page 35, Transcript of Records.) And that three coupons were cut off, being $150 of the interest of said bonds; in strict compliance with the provision of the Act of 1869. Page 310, Sec. 4 and 5, Private Laws of Illinois; also Transcript of Record, page 35.

Though the election under the Amendatory Act of February 24, 1869, was not held until May 20, 1870, the bonds were held in escrow, under Sec, 4, page 310, Private Laws of Illinois, and not delivered until May 27, 1870, and though dated April 1, 1870, were not in law issued and valid until delivered.

Under the Act of February 24, 1867, and the Amendatory Act of February 24, 1869, both of which are referred to in the recitals of the bonds, the Town of Harter had full and ample power to issue the bonds, and that this power was legally executed by the Supervisor and Clerk, as provided for in these Acts.

It is admitted that John A. Kernochan is the holder and owner of the whole issue of Harter Township Bonds, amounting to $20,000. That he purchased them for a valurble consideration before due, and without any notice of any defense to the bonds except that appearing in the law under which the bonds were issued and the recitals on their face. Agreement; Transcript of Record, page 32, 1st.

We submit that under this state of facts he is entitled to all of the rights, and the protection, given to innocent holders of bonds purchased before due, for a valuable consideration.

REGISTRATION.

In the Amendatory Act of February 24, 1869, Private Laws Illinois, 3d Vol., Sec. 14, page 314, it provides that "the holders of $20,000 or "upwards of the bonds of any county or city, issued in pursuance to this "Act, or the Act to which this is amendatory, may at any time file the "same with the Auditor of Public Accounts for registration, and for the "collection and payment of interest and principal, and all the provisions "of an act relating to county and city debts, and to provide for the payment "thereof by taxation in such counties and cities, approved February 13, 1865, "so far as the same relates to registration, collection and payment of interest, "according to the tenor of said bonds, shall be in force and applied for "the benefit of all such bonds so registered." * * *

Under the statute these bonds were registered in the office of the Auditor of Public Accounts for the State of Illinois, May 31, 1870, *on the sworn statement of the Supervisor, C. K. Hendee*, then representing the Town of Harter, and holding its highest office, the man who signed the bonds and the man who signed the call for the election of May 20, 1870. That all the laws precedent, necessary to the validity of the $20,000 of Harter Township bonds had been complied with, and that they were properly entitled to registration under the Amendatory Act of February 24, 1869, as well as the Act of April 16, 1869, referred to in the sworn statement of C. K. Hendee. Transcript of Records, pages 30 and 31, Exhibit B; also Public Laws of Illinois, page 44, and Hurd's Revised Statutes of Illinois, 1880, Secs. 3 and 4 page 803.

The counsel for appellants denies that the bonds were duly registered in the office of the Auditor of the State of Illinois.

The bill of complainants avers that the bonds were registered in the office of the Auditor of the State of Illinois, "*on the 31st day of May, A. "D. 1870, and after the same were so registered said bonds were negotiated.*" * * * Page 4, Transcript of Record.

In the Decree of the Circuit Court of Clay County, Illinois, it is stated "*that said bonds were on the 31st day of May, A. D. 1870, registered in "the office of the Auditor of the State of Illinois, and after being so "registered were negotiated.*" * * * Transcript of Record, page 22.

Again, the answer of Kernochan states "*that said bonds were registered "on or about the 31st day of May, 1870, in pursuance of law, in the office "of the Auditor of Public Accounts of the State of Illinois.*" Page 28, Transcript of Record.

Then, again, the affidavit of Supervisor C. K. Hendee, made peliminary to the registration of said bonds, *and by virtue of which they were registered, and without which they could not have been registered, dated* MAY 28, 1870, *has endorsed upon it the file mark of the Auditor of Illinois.*

"FILED MAY 31st, 1870, *C. E. Lippincott, Auditor Public Accounts.*" Transcript of Record, page 31.

We invite the special attention of this Court to the fact that the Bill of Complaints avers, the decree of the Circuit Court of Clay County, Illinois, states, the answer of the defendant avers, and the file mark of the Auditor of Public Accounts of Illinois all agree that said bonds were registered *May* 31, 1870, and not *May* 13, 1870, as the counsel for appellants insist, and that the statement at the foot of page 29 of Transcript of Record—"*Auditor's Office Illinois, Springfield, May 13th*, 1870,"—is a *misprint*, and must be so considered by this Court, as the references above made to the language of the bill, the decree, the answer and the file-mark of the Auditor, which are of equal value before this Court as a part of the record, all agree that the bonds were registered *May 31st*, 1870, *and not May 13th*, 1870.

These bonds were, therefore, not issued, delivered and registered until *after the election* under the Amendatory Act of February 24, 1869, which occurred May 20th 1870.

CONSOLIDATION OF ROADS DOES NOT DEFEAT SUBSCRIPTIONS OR DONATIONS VOTED IN AID OF THEIR CONSTRUCTION.

It is admitted that there was a consolidation of the Illinois Southeastern Railway and the Pana, Springfield and Northwestern Railway Company on or about December 3, 1869, and that the consolidated railway company became a corporation under the name and designation of the Springfield and Illinois Southeastern Railway Company, and by virtue of said consolidation succeeded to all the rights of the constituent companies, so far as it was authorized to do by law, and no farther.

Transcript of Record; Agreement; page 32.

The donation of Harter Township was voted in aid of the construction of the Illinois Southeastern Railway Company, November 10, 1868. The election held to see whether bonds should be issued to pay off that donation, or levy special tax, was held May 20, 1870. The bonds were of date April 1, 1870, to the Illinois Southeastern Railway Company *or bearer*, and were guaranteed by the consolidated company, "The Springfield and Illinois Southeastern Railway Company, by virtue of a resolu-

tion of said Company, passed on the 13th day of April, 1870, and the guarantee endorsed on the bonds by Thomas S. Ridgeway, its President, April 21, 1870. Transcript of Record, page 30.

These bonds were issued to the Illinois Southeastern Railway Company, *or bearer*, and *were delivered* to the representatives and successor of that company May 27, 1870; both companies in the issue and guarantee of the bonds were represented, and they were delivered to Thomas S. Ridgeway, who was President of the road to whose aid they were voted, and of its successor, to whom the bonds were delivered. The Town of Harter has no legal ground of complaint when she has issued her bond to the Illinois Southeastern Railway Company, *or bearer*, and they are, by her own officials, delivered to the Springfield and Illinois Southeastern Railway Company. In law they were issued to *bearer*, and would have been good in the hands of any holder as far as this question of consolidation of the companies is concerned.

There is no question raised as to the fulfilment by the railroad companies of all conditions precedent to the issue of the bonds. The Town of Harter raises no question of equity; admits that she has received in the road all that she asked for, but seeks to evade the payment of her bonds on the merest technicalities of law that it is possible to raise. But even legal technicalities do not help her, for the act of incorporation of the Illinois Southeastern Railway Company gives full and ample powers of consolidation with other railway companies. Private Laws of Illinois 1867, Vol. 2d, Sec. 6, page 751.

Again, in the Amendatory Act of February 24, 1869, Private Laws of Illinois 1869, Vol. 3, page 11, Sec. 7, express powers are again given to this company to consolidate with other railway companies, and in the Private Laws of Illinois 1867, Vol. 2, page 615, Sec. 5, full powers are given to the Pana, Springfield and Northwestern Railway Company to consolidate with other railway companies, and the act of incorporation of all these railroad companies grants the power to consolidate with other companies, upon such terms as may be agreed upon by the consolidating companies, and in each and every instance the consolidated company at once succeeds to all the rights, privileges, franchises and powers of the companies so consolidated. This is not only the express language of the acts of incorporation of these railroad companies last above referred to, but this Court has frequently decided the question that a consolidation of railroad companies does not defeat subscriptions or donations voted in their aid.

Empire vs. Darlington; 11 Otto, page 87.

It is *not true*, as counsel for complainants avers, (page 53), "that the "bonds were made payable to the Illinois Southeastern Railway Com- "pany, and were issued long after that corporation had ceased to exist, "surrendered its franchise and gone out of existance."

It is true that the bonds were made payable to the Illinois Southeastern Railway Company, OR BEARER, which means, in this case, John A. Kernochan, and the Town of Harter is in the same position as if the name of John A. Kernochan had been placed in the bond instead of bearer.

The Illinois Southeastern Railway Company was not extinct but simply merged into another company, and was alive and very active through its same President, Thomas S. Ridgeway, who was made President of the consolidated company. So the company was not only not extinct, but there was not even an interregnum; as soon as the one company ceased to control the rights, privileges and franchises, the other company immediately assumed their exercise, in accordance with the powers conferred in the same, under which they were consolidated.

A very different question might have arose had there been no successor, and no consolidation of the railroad companies. The Illinois Southeastern Railway Company did not surrender its charter and all its privileges to the State; but on terms mutually agreed upon, consolidated with the Springfield and Illinois Southeastern Railway Company, as provided for by the charters of both of said companies. This Harter Township donation was an asset of the Illinois Southeastern Railway Company, and was the property of its successor, and when the bonds were issued they were delivered to the successor, the Springfield and Illinois Southeastern Railway Company, by the Harter Township officials, with a full knowledge of the consolidation.

RECITALS ON THE BONDS.

In section 12, of the Amendatory Act of February 24, 1869, Private Laws of Illinois, 3d Vol., page 314: "That where payment of subscrip- "tions to the capital stock of said company have been, or shall be made, "by villages, cities, counties or townships, under any act authorizing such "subscriptions or donations to be made, all such bonds issued or nego- "tiated by the proper authorities of such villages, cities, counties or "townships, and appearing regular on the face thereof, *shall, in the hands "of said company, or any other bona fide holder thereof, be deemed and "taken, in all courts and elsewhere, as prima facie evidence of the regularity "of everything required by the several acts to be done preliminary to the "issuing and negotiation of said bonds.*"

Uuder this law these bonds appearing regularly on their face, in the hands of said railroad company *or any other bona fide holder thereof* were declared to be deemed and taken in all courts and elsewhere, as *prima facie* evidence of the regularity of everything required by the several acts to be done preliminary to the issuing and negotiating of said bonds. This Act embodies the settled doctrine of this Court, well defined at that time and strictly adhered to ever since as to recitals.

In addition to this express statute on that subject the Supervisor, C. K. Hendee, who signs them and procures their registration, swears that all the necessary steps preliminary to their issue and registration have been duly taken and the laws complied with.

On the face of the bonds is the following recitals:

"This bond is one of a series of bonds issued by said township to aid "in the construction of the Illinois Southeastern Railway, in pursuance "of the authority conferred by an Act of the General Assembly of Illi- "nois, entitled, "An Act to Incorporate the Illinois Southeastern Railway "Company, approved February 25, 1867," and "An Act Amendatory "thereof, approved February 24, 1869,"and an election of the legal voters "of the aforesaid township, held on the 10th day of November, 1868, "under the provisions of said act."

Exhibit A, Transcript of Record, page 29.

Reference is here made to the law of 1867 and the Amendatory Act of 1869, and to the election of November 10, 1868. The election of May 20, 1870, is not here set out in words, *but the Act under which it was held, that of* 1869, *is specially referred to as part of the authority* under which the bonds were issued, and is as binding on the Town of Harter as to the effects of the recital as if the date and place, and result of that election had been spread at length upon the face of the bonds.

In the argument of counsel for appellants, under "Notice by Recitals," page 59, they say: "No authority was conferred by the act under which "the vote was taken, to issue municipal bonds, and certainly by the guar- "antee on the back of bonds, by the Springfield and Illinois Southeastern "Railway Company, the holder or purchaser had notice that they were "made payable to one company and issued to another."

The Act of 1867, referred to by counsel, does authorize townships to make donations on propositions from the Directors of the railroad company, and the vote of November 10, 1868, was a proposition to donate $20,000, or issue bonds for that amount, provided the railroad company should be compelled to take the bonds in lieu of the money to be raised by special tax.

Transcript of Record, page 9, 2d, of Proposition, evidently the only reasonable construction of this act, and the proposition voted upon November 10, 1868, is that the people concluded to issue the bonds and the railroad company agreed to take them in lieu of the special tax, and the Amendatory Act of 1869, then contemplated and referred to in the proposition, and cited on the bonds, completes the authority to issue, if any was wanting at the time of the election of November 10, 1868.

Counsel avers in their argument under the same head, (page 59), that "even the authority attempted to be conferred by the Amendatory Act "to the charter of the Illinois Southeastern Railway Company, was made "subsequent to the holding of the special election recited in the bonds," etc.

They are mistaken as to the facts in this particular. The Amendatory Act referred to was in force February 24, 1869. and the special election held thereunder was held May 20, 1870. (Private Laws 1869, Vol. 3, page 308, and Transcript of Record, page 10.) And as to the execution of the authority conferred, the Supervisor and the Clerk of the Town were the corporate authorities not only designated by that act to sign and countersign the bonds, but they are the very same officers who always, and under all laws, execute on the part of such municipalities, in the State of Illinois, under township organization, the contracts for their respective towns.

Hurd's Statutes of Illinois, page 1090, Sec. 126.

Counsel for appellants avers, (page 59), "That the holder or purchaser "had notice that they (the bonds) were made payable to one company "and delivered to another." Here, again, counsel for appellants fail to state fully the facts. The bonds were payable to the Illinois Southeastern Railway, *or bearer*, and this is the recital on the face.

Transcript of Record, Exhibit A, page 29.

Counsel for appellants admit the doctrine of this Court as well settled, (Page 62 of their argument), "that if the facts be recited on the face of "the bonds themselves by the proper municipal authorities, the municipality "is estopped from questioning their validity" We submit that these recitals were placed on the bonds by the proper municipal officers, those designated by the law, and that the Town of Harter cannot now question the validity of their bonds. This Court has constantly held that the recitals on the face of municipal bonds are conclusive as to the facts they cover.

Town of Coloma vs. Eaves; 2 Otto, page 484.

Town of Venice vs. Murdock; 2 Otto, page 494.

San Antonio vs. Mehaffy; 6 Otto, page 312.

THE RIGHT OF REMOVAL.

It is admitted that John A. Kernochan is and was at the time of the decree and fi ing of his petition, and had been for a long time prior thereto, a citizen of Massachusetts, and that all the complainants and other nominal defendants were citizens of Illinois. That the amount in controversy is the whole issue of Harter Township Bonds, $20,000 and coupons attached, and that John A. Kernochan is and was the owner and holder of said bonds, purchased for a valuable consideration long before due.

Transcript of Record, page 32; Agreement.

The record shows the bill filed September 3d, 1878. The injunction was probably immediately granted by the Master in Chancery, though there is no date or names affixed to the order thereof. Transcript of Record, page 8.

The decree, *pro-confesso*, was rendered without any trial whatever on the merits of the bill; no one even appearing or filing any answer whatever. on the 2d day of May, 1879. Clay County Circuit Court has but two sessions annually, the March Term commencing on the 3d Monday of March, and the September Term commencing on the 2d Monday of September. Hurd's Revised Statutes of Illinois, page 333, Sec. 7813. This is a small county, and the Terms seldom last over two weeks at most. Kernochan knew nothing of the pending of the case in that court affecting his bonds, and the decree *pro confesso* that had been rendered until after the commencement of the September Term and not in time to have procured his bond and prepared his petition for that Term if it had been necessary for him to appear then to save the right of removal. He did appear, by his attorney, at the next Term, the March Term, 1880, which was *the first Term at which it was possible for him to appear* after he had knowledge of the pending of the suit and the existence of the decree against his bonds.

The Statute of the State of Illinois (Hurd's Revised Statutes, 1880, page 189, Sec. 19,) provides that "when any final decree shall be entered "against any defendant who shall not have been summoned or served "with a copy of the bill, or received the notice required to be sent him "by mail, and such person, his heirs, devisees, executors, administrators, "or other legal representatives, as the case may require, shall, within "one year after notice in writing is given him of such decree, or within "three years after such decree, if no such notice shall have been given as "aforesaid, appear in open court and petition to be heard touching the "matter of such decree, and shall pay such costs as the Court shall deem

"reasonable in that behalf. The person so petitioning may appear and "answer the complainant's bill, and thereupon such proceedings shall be "had as if the defendants had appeared in due season and no decree had "been made. And if it shall appear upon the hearing that such decree "ought not to have been made against such defendant, the same may be "set aside, altered or amended, as shall appear just; otherwise the same "shall be ordered to stand confirmed against said defendant. The decree "shall after three years from the making thereof, if not set aside in "manner aforesaid be deemed and adjudged confirmed against such de-"fendant, and all persons claiming under him by virtue of any act done "subsequent to the commencement of such suit; and at the the end of "of said three years the Court may make such further order in the prem-"ises as shall be required to carry the same into effect."

Under this statute of Illinois, John A. Kernochan, through his attorney, filed in open court, at a regular session of the Clay County Circuit Court, Illinois, his sworn petition on the 17th day of March, 1880, asking for the relief this statute above quo'ed offers; and among other things sworn to in said petition is the following:

"And your petitioner further represents unto your Honor, that he has "not been summoned or served with a copy of the said bill of complaint, "or received notice of the pending of said suit, required by the statute "to be sent him by mail by the Clerk of this Court, and has received no "notice in writing of such decree, save through a private letter from his "attorney, informing him that such decree had been made," etc. Transcript of Record, page 15.

The said John A Kernochan, then, immediately subsequent to the filing of the above referred to sworn petition, on the same day of the said Clay County Circuit Court, through his attorney filed the following motion:

"HARTER TOWNSHIP, JAMES S. WILLIAMS "AND W. S. WALKER. "*vs.* "EDWARD RUTZ, *et al.*	At the March Term Circuit Court, A. D 1880.

"And now comes John A. Kernochan, through George A. Sanders, his "attorney, and moves the Court that the above entitled cause be placed upon "the Docket, and the Decree be open d, as in such cases made and pro-"vided by the statute. GEORGE A. SANDERS,

"Att'y for John A. Kernochan."

Exhibit G, Transcript of Record, page 14.

This petition was read and granted in presence of A. H. Chesley and Judge Hoff, who appeared for Harter Township and the complainants and

assented thereto, and the motion to re-docket the cause and to open the decree was made and read in their presence, and they assented thereto, and the Court granted the petition, allowed the motion, and the cause was placed upon the docket. Immediately thereafter the petition for removal of the cause to the United States Circuit Court for the Southern District of Illinois, was filed and the requisite bond was tendered, both of which being examined by complainants' attorneys, then present, and assenting thereto. The Court granted the petition; the bond was approved, and the Court ordered "that the cause be certified to said Federal Court, and "that the Clerk of this Court transmit all papers belongiug to this cause "to said Federal Court."

Transcript of Record, page 24.

The proceedings thus far would seem to be entirely regular, and if they were not, one of the attorneys, Judge Hoff, of record for the complainants, was present and assented thereto, which would have cured any irregularity of proceeding, had any occurred.

Under the statute last above quoted the defendant, John A. Kernochan, *had a year to open said decree after notice in writing, and if no notice, then he had three years, after the decree* "to appear in open court and petition "to be heard touching the matter of the decree, and shall pay such costs "as the Court shall deem reasonable in that behalf, the person so petition- "ing may appear and answer the complainants' bill, *and thereupon such "proceedings shall be had as if the defendants had appeared in due season "and no decree had been made.*"

We insist that under this statute the defendant *had a right to appear within three years after the decree and have the same opened, and plead, answer or demur to the matters involved in the decree, or remove his cause to the Federal Courts.* He swears in his petition he had no notice whatever of the decree and pending suit until long after the decree was rendered. He did appear in less than ten months after the decree was rendered, and at the first session of the Clay County Circuit Court after he was informed of the existence of the suit and decree. There had never been any trial of the merits of the case. There was no contest as to the jurisdiction of the United States Circuit Court over the case, all this being fully shown by the sworn petition of the defendant.

We insist, therefore, that as soon as the petition was filed in the Clay County Circuit Court for relief, and the motion to docket the cause and open the decree had been allowed, the defendant had then an opportunity to plead, or answer, or file his petition for removal. He was in the same position and had every legal right the laws allows for the purpose of re-

moval that he would have had had he been summoned and appeared on the first day of the term of the court at which the bill was filed.

The law requires the party desiring to remove a cause from the State to the Federal Court to file his petition and bond at the first term at which the cause could be tried on its merits.

We insist that this was done in this case; there being no trial when the decree was rendered.

It also requires that the petition must be filed with bond before the pleadings are perfected for the trial. After the motion was allowed to re-docket, and open the decree, the defendant was then obliged to file his petition for removal, or lose his right to do so. That he was in ample time, and had the right to removal, the following decisions fully affirm:

Greene vs. Klinger; October Term, 1879, U. S. Supreme Court.

Meyer vs. Construction Company; 10 Otto, page 457.

Brooklyn vs. Insurance Co.; 9 Otto, page 362.

Under the statute of the State, *Supra*, are the following decisions:

Empire Transportation Co. vs. Richards Bros.; Illinois Reports, Vol. 83, page 404.

The Southern Bank of St. Louis vs. Geo. D. Humphreys *et al.*; Illinois Reports, Vol. 47, page 227.

A Decree under Illinois statute *on defendant not personally served*, is *only interlocutory and does not become final until the expiration of three years after its rendition, etc.*

James W. Martin vs. Henry H. Gilmore *et al.;* Illinois Reports, Vol. 72, page 193.

APPELLANT'S ASSIGNMENT OF ERRORS.

Appellant assigns as error the following points: First, The Court erred in overruling the motion to remand this cause to the Circuit Court of Clay County, Illinois. (Page 38, Transcript).

1st, "Because the said Circuit Court of the United States had no jurisdiction of said cause."

This assignment of error is extremely indefinite. Appellant fails to state wherein the want of jurisdiction lies. It is admitted that the appellee, Kernochan, the real party in interest defendant, is a citizen of another State. If this action had originated by appellees filing a declaration in the U. S. Circuit Court against the Town, to enforce the payment of the bonds, no question as to the jurisdiction of the Court could possibly have arisen. After the entry of the decree, and as soon as knowledge of its

existence came to him, Kernochan appeared in the Clay Circuit Court, by attorney, moved to open the decree and re-docket the cause, under Sec. 19, Chap. 22, Revised Statutes of Illinois. This motion was granted and the cause re-docketed. He then filed his petition for removal to the United States Circuit Court, setting forth the proper grounds for such removal, (See page 16, Transcript), with the requisite bond. This petition was likewise granted. At the June, 1880, Term of the U. S. Circuit Court for Southern District of Illinois, he filed the proper record from the Clay Circuit Court. The cause was then properly before the U. S. Circuit Court, and was as fully within the jurisdiction of said Court as if it had been originally brought in that Court. (See 4th point, page 38, Transcript). Appellee is content to leave the question of jurisdiction to this Court without further argument.

II.

"2d. That the petition for removal of said cause was not filed in the State Court at the first term thereof at which said cause could have been heard."

Appellant bases this point upon a clause of the Act of March 3d, 1875. (U. S. Stats. '73-75, page 470, chapter 137). This act provides that when a party is entitled to a removal of a cause pending in a State Court to U. S. Circuit Court, upon filing his petition in said State Court, "*before or at the term at which said cause could be first tried, and before the trial thereof*" * * * he shall be entitled to such removal, &c.

It is manifest that this clause of the statute can not deprive appellee of his rights under section 19, chapter 22, Revised Statutes of Illinois. By this act a party defendant, who has not been summoned, served with a copy of bill or received the notice required to be sent him by mail. may at any time within a year from the time of receiving written notice of a decree entered by default against him; or if no notice is so received, at any time within three years after the entry of such decree, appear in the Court in which such decree was entered, and file his petition to be heard touching the matters of such decree, and upon cause shown, such decree shall be set aside, etc.

Appellee, under and by virtue of this statute, appeared within one year of the entry of said decree against him, to-wit: at the April Term, A. D. 1880, of Clay Circuit Court, and there filed his petition, bond, etc. His petition was granted, and the cause re-docketed, He then filed his petition for a removal, at the same term of said Court.

When the decree in question had been set aside the parties in this

action stood in the same relation to each other as they would have done had appellee appeared at the November Term of the State Court and entered his appearance. The April Term, 1880, was, in the light of every just and reasonable construction of the Act of 1875 above referred to, "the first term at which said cause could be tried." In brief, appellants contend, that appellee, though he was entitled to a removal, was bound to appear and enter his motion for such removal before he had been served with process, personally or by mail, or had any notice or knowledge of the pendency of the action against him. The position taken by appellant upon this question is unreasonable and absurd, and would, in effect, deprive appellee of an important right conferred to him by section 19 of our Chancery Practice, above quoted. The object and intention of the removal clause of the Federal Act of 1875 is to prevent delay in the removal of causes and to ensure reasonable diligence on the part of persons desiring such removal. Appellee respectfully submits to the Court that he has conformed to the spirit of this act, and has exercised all reasonable diligence in the matter of removal.

III.

3d. "The petition and bond were not filed in said State Court until after a decree had been entered in said cause, in said State Court."

The above, like appellant's last assignment of error, (2d) is based upon an extremely technical construction of the clause of the Act of March 3, 1875.

To this argument appellee makes the same reply as to the last position of appellant above, viz: That he proceeded under and in conformity to the provisions of the Illinois Chancery Practice, (Sec. 19, Chap. 22, Revised Statutes), and the decree having been set aside, he was entitled to a removal under the Act of March 3d, 1875, as if appellants original summons had been returnable at the April Term, 1880, of the Clay Circuit and appellee had there entered his appearance and moved to remove the cause to the U. S. Circuit Court. After the opening of said decree and the re-docketing of the cause, there had been no "*trial*" in the sense of the language of the Act of March 3d, 1875, above referred to, the cause stood in reality as a new cause upon the docket of that Court. It cannot be presumed that even appellants' counsel would have denied the right of appellee after the opening of such decree, and the re-docketing of the cause, to have filed his answer, had he chosen to do so, in the Clay Circuit, the right to have done this is expressly granted by the 19th section of the Illinois Chancery Practice, above referred to, (Sec. 19, chapter 22,

Revised Statutes of Illinois, 1880,) which provides * * * (after filing petition to be heard and showing cause for setting aside). "*Thereupon such proceedings shall be had as if the defendant had appeared in due season and no decree had been made.*"

If under this clause appellee had a right to file an answer or take any other ordinary steps in defense of his rights, he clearly had a right to remove the cause in question to the U. S. Circuit Court, notwithstanding the entry of a prior decree by default.

IV.

4th. "That there was no controversy existing between the petitioner for the removal of said cause and said complainants."

The only reply appellee need make to the above is to refer the Court, and appellant's counsel, if he has so far forgotten its contents, to the original bill filed by appellant at the October Term, 1879, of the Clay Circuit Court. (Folio 17, Transcript). The complainant having craved an injunction restraining the levy, collection and payment of certain taxes by certain town, county and State officers, proceeds as follows: * * * "and that said owners and holders of said bonds and coupons be restrained from negotiating the same, or by themselves, agents or solicitors, attempting in any manner to coerce, by suit or otherwise, the collection of said bonds or coupons, and that upon the final hearing of this bill the said injunction may be made perpetual," etc. * * *

In the face of this clause of his original bill appellant's counsel attempts to contend that there was no controversy between the Town of Harter and John A. Kernochan, and that the controversy was wholly between the said town and the several nominal defendants, ministerial officers of the town; county and State, who in fact had no interest whatever in the issue of the controversy.

In his argument appellant contends that appellee had no interest in the proceedings for an injunction restraining the levy of taxes, etc. No position could be more untenable. It is clear that such an injunction must materially effect appellee's rights under his bonds. It is useless to deny that a controversy did exist between appellant and appellee, and the fact that appellant has assigned as error a matter so manifestly without foundation in fact is but one of many illustrations of the weakness of his cause.

V.

"5th. That the controversey, if any, is not wholly between citizens of "different states, nor between the complainants and the parties seeking "to remove said cause."

The point above made has no pertinency to the questions of this cause. Appellee filed his petition for removal herein, under and by virtue of the 2nd clause of Sec. 639, Chapter 7, Revised Statutes United States, which provides as follows:

"Second: When the suit is against an alien and a citizen of the State "wherein it is brought, or *is by a citizen of such State against a citizen of* "*the same, and a citizen of another State,* it may be so removed, as "against said alien or citizen, or citizen of another State, upon the petition "of such defendant, filed at any time before the trial or final hearing of "the cause, if so far it relates to him, it is brought for the purpose of "*restraining or enjoining* him, or is a suit in which there can be a final "determination of the controversy, so far as concerns him, without the "presence of the other defendents as parties in the cause. But such re-"moval shall not take away or predjudice the right of the plaintiff to "proceed at the same time with the suit in the State Court, as against the "other defendants."

As will be seen by a careful perusal of the above, it is not necessary to entitle a party to a removal that the suit be "wholly between citizens of different states" as claimed by appellant in his objection. The Town of Harter is a citizen of the State of Illinois, Edward Rutz, Thomas B. Needles and the other parties with whom appellee was joined were "citizens of the same State." appellee, Kernochan was "a citizen of another State," viz: of the State of Massachusetts. Hence Kernochan, one of the unknown bondholders was properly entitled to a removal,—appellant had no reason to object to such removal, granted to appellee under the provisions of a statute with which he fully complied. In a preceeding assignment of error he in substance alleges that there was no controversy between himself and appellee Kernochan, that the action was against the county and State officials, if this were the case why has he opposed appellees removal to the United States Court? By the terms of the statute quoted above the right to proceed against parties defendant who are residents of the State is conserved to appellants, and hence they cannot claim that they sustained any injury or prejudice in their action against the State and county officials by the removal of the cause, as far as effecting appellee to the United States Court.

VI.

"6th. That the parties petitioning for the removal of said cause had not filed certified copies of the record and proceedings in said cause on the first day of said Circuit Court, as required by the act of Congress of

March 3d, 1875, but instead thereof have brought up and filed the original papers which belong to the files of the State Court."

The language of the clause of the order commanding the clerk to transmit record is as follows: "And it is ordered by the court that the cause be certified to said Federal Court, and that the clerk of this court transmit all papers belonging to this cause to said Federal Court." (Page 24, Transcript.) This order was drawn by the court and not submitted by the counsel for the approval of the presiding judge. It will be seen that it does not expressly call upon the clerk to certify a copy of the record, and in this particular is perhaps somewhat indefinite, if so, this is the fault of the Circuit Judge of Clay County. But it would seem that a clerk who was constantly called upon to certify records on appeals &c., should have properly certified the record to the United States Circuit Court, at least the error alleged by appellants in the matter of transmitting the record is not chargeable to appellee, nor should he suffer any prejudice in his rights by the ignorance or carelessness of the officers of the State Court.

Even admitting that the clerk of the Clay Circuit sent original record instead of a certified copy, that the files of a State Court were thereby impaired, yet this is no such error as will ground a reversal of judgment for appellants sustained no injury or prejudice from the filing of original records instead of copies. If in his brief or argument appellants counsel had shown any disposition to rely upon such record, the original thereof was even better than a copy, for there was no danger of errors, or mistake incident to transcribing. After the appearance of appellee in the Clay County Court, he was in fact the only defendant. No advantage would have accrued to appellants by continuing the prosecution of his bill against the mere nominal parties thereto, as they might have done under Sec. 19, Chap. 22, of Chanery Practice. In fact the decree already entered against the State and county officers was still binding, and unimpaired as to them, by the provisions of the above section, and of section 639, Revised Statues of United States. Hence the absence of the original records of this suit, from the files of the State Court were in no sense a hardship to appellants, and certainly they enjoyed every right, privilege, and advantage in the matter of reference, proof &c., as they would have enjoyed had copies instead of originals been filed.

As to the assignments of error under the 2d, head of counsels brief for appellants, Page 38, of Transcript of Record, and the reasons 1st, 2nd and 3d given therefor. We would say that they are all covered by the decisions of this court in the following cases:

Town of Concord vs. Savings Bank, 2, Otto, Page 629. "A popular election having been held, and a majority of votes cast at the election, "having been in favor of the appropriation it may be conceded that pay- "ment of the appropriation could lawfully have been made in town bonds "instead of money, if the donation itself was authorized."

As to reasons 4th and 5th, of appellants council, under second head of assignments of error, Page 38, Transcript of Record, there is no evidence of any illegality in the election of Nov. 10, 1870, but on the contrary all the steps preliminary thereto were carefully taken in accordance with the provisions of the Railway Co's. charter—exhibits B. and C. Transcript of Record, Page 9. And if the Amendatory Act of Feby. 24th, 1869, was unconstitutional, of which counsel for appellants fail to show, it would not effect the rights of an innocent holder of the bonds of Harter Township purchased for value before due.

As to the 6th reason for error assigned under 2nd head of council for appellants, Page 39, Transcript of Record.

We affirm that the Supervisor and Town Clerk were not only named as the Agents in the act of the Legislature, (Brooklyn vs. Insurance Co., 9, Otto, 362,) but were also the *defacto and dejure* officers of the town for executing the contracts of the town, and that any preliminary defects in the execution of their powers, if there were any such. were waived as far as the town was concerned by the recitals on the bonds.

County of Warren vs. Marcy, 7, Otto, Page 96. These bonds were issued to the *Illinois Southeastern Railway Company* or bearer, but *were delivered to the Springfield and Illinois Southeastern.*

Transcript of Record, Page 10.

The consolidated company had r right to receive the bonds.

Empire vs. Darlington, 11. Otto, Page 87.

County of Scotland vs. Thomas, 4, Otto, Page 689.

Town of East Lincoln vs. Davenport, 4, Otto, Page 801.

69 Ills. Reports, 523; Mapes vs. The People.

24 Ills. Reports 184; Ballou vs. Bangs.

10 Ills. Reports 105; People vs. Ammons.

As to reason given for assignment of error, 7th, 8th and 9th, Transcript of Record, Page 39. they all refer to registration, and counsel is mistaken as to the date of registration, that being May 31st, and not May 13th 1870, as already shown under that head, and that question is only a collateral one at best and not material in the issues of this case.

In this case the appellants have no equities, whatever, having received all they asked for in the railroad now running through their Township, and having paid their interest regularly for ten years, or thereabouts without any question, and having as it appears to us, no law upon which to ground their bill of complaints.

We can, for the reasons above given, find no error in the action of the courts below in this case and ask that the decree in the United States Circuit Court for the Southern District of Illinois be affirmed.

GEORGE A. SANDERS,

Solicitor for John A. Kernochan, Appellee.